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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
LARRY WALTER SLAYMAKER,	)	6-411 86-347
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County (AG3795-0285) - John F. Siebenmann, Judge.

Defendant appeals the judgment and sentence entered on a jury verdict finding him guilty of operating while intoxicated, second offense, in violation of Iowa Code section 321.281, and of failing to render aid or information following an accident, in violation of Iowa Code sections 321.261 and 321.263. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Mark H. Rettig of Hines, Pence, Jackson, Day & Powers, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Robert P. Ewald, Assistant Attorney General; Steven K. Hansen and Stephen A. Swift, Assistant Linn County Attorneys; for plaintiff-appellee.

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

SCHLEGEL, J.

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Defendant appeals the judgment and sentence entered on a jury verdict finding him guilty of operating while intoxicated, second offense, in violation of Iowa Code section 321.281, and of failing to render aid or information following an accident, in violation of Iowa Code sections 321.261 and 321.263. We affirm in part, reverse in part, and remand.

On February 9, 1985, at approximately 10:00 p.m., the defendant, Larry Walter Slaymaker, was involved in an automobile accident while driving home after drinking beer at a Cedar Rapids tavern. Slaymaker's pickup truck collided with a car driven by Amy Saunders. Following the collision, Saunder's boyfriend, Bruce Freisinger, who was a passenger in Saunder's car, attacked Slaymaker and observed that he appeared to be intoxicated.

Slaymaker fled from the scene of the accident and was later apprehended by two police officers who also observed that he appeared to be intoxicated. After Slaymaker failed several field sobriety tests and a preliminary breath test, he was placed under arrest and charged with OWI and failure to render aid or information following an accident. A blood sample was drawn from Slaymaker about an hour and twenty minutes after the accident. The results of the blood test showed Slaymaker's blood alcohol level to be 0.256. This is above the statutory level of 0.13 which constitutes OWI.

On June 14, 1985, Slaymaker filed a pretrial motion to suppress the results of the blood test, arguing that Iowa Code section 321B.28 limited the admissibility of blood alcohol concentration to "evidence of the amount of alcohol or drugs in the person's blood at the time of the act alleged." Slaymaker asserted that the test results were irrelevant because he allegedly ingested alcohol after the accident but before the testing. Following an evidentiary hearing the court denied his motion. When trial commenced on January 27, 1986, a police officer

testified that Slaymaker denied drinking between the time of the accident and the time of his arrest. Slaymaker's renewed objections to the blood test results were overruled.

Slaymaker requested that the court give certain instructions to the jury on the OWI and aid and information issues. The court denied his request and instead issued jury instructions of its own. On January 29, 1986, the jury returned a verdict finding Slaymaker guilty as charged. Slaymaker's motions for acquittal, directed verdict of not guilty, and new trial were overruled.

Under Iowa Code section 903.1(2), second offense OWI carries a maximum penalty of two years in prison or a fine not to exceed $5,000, or both. Under Iowa Code section 903.1(1)(b), failure to render aid or information following an accident carries a maximum penalty of one year in prison or a fine not to exceed $1,000 or both. On February 26, 1986, the court sentenced Slaymaker on the second offense OWI charge to serve 30 days in the county jail with 23 days being suspended and imposed a fine of $750 plus a fifteen percent surcharge. On the failure to render aid and information charge, the court sentenced Slaymaker to serve 365 days in the county jail with 335 days being suspended and imposed no fine.

Defendant contends the trial court erred: (1) in overruling his pretrial motion to suppress evidence obtained from a blood sample drawn from him an hour and twenty minutes after the accident occurred; (2) in giving its own jury instructions on OWI and aid and information in lieu of defendant's requested instructions; and (3) in failing to grant defendant's motions for acquittal, directed verdict of not guilty, and new trial. Defendant also contends the trial court abused its discretion in sentencing him.

Our scope of review is limited to corrections of errors at law. Iowa R. App. P. 4. However, when issues involve constitutional rights, we review the

evidence de novo in view of the totality of the circumstances. State v. Aldape, 307 N.W.2d 32, 36 (Iowa 1981).

I.

The defendant first contends that the trial court erred in overruling his motion to suppress and in admitting into evidence the results of his blood test.

Iowa Code section 321B.28 (1985), establishes the statutory basis for the admissibility of alcohol concentration in a person's body substances, including blood, "at the time of the act alleged." Foundational questions governing admissibility of results of tests administered pursuant to chapter 321B are to be determined by the court. State v. Hershey, 348 N.W.2d 1, 2 (Iowa 1984). Our review is for abuse of discretion. State v. Oliver, 341 N.W.2d 744, 747 (Iowa 1983). In the circumstances where an OWI arrest does not immediately follow an observation of the defendant actually operating a motor vehicle, a question can arise as to whether the test results are probative of the defendant's condition at the time of the alleged drunk driving, or whether the test results are merely reflective of defendant's condition at some later time and therefore, the test results are inadmissible as irrelevant evidence. In State v. Creighton, 201 N.W.2d 471, 473 (Iowa 1972), the supreme court said that the fact that a defendant was under the influence at the time of arrest will not support a finding that he was in that condition when driving the vehicle at an earlier time without a showing of more. The ultimate question which must be answered by proof beyond a reasonable doubt is whether defendant was intoxicated while driving the motor vehicle. Id. In our determination of whether or not the trial court erred in overruling the motion to suppress, we may consider the evidence adduced in the motion to suppress as well as the later trial testimony. State v. Brown, 253 N.W.2d 601, 603 (Iowa 1977).

The court heard the testimony of Officer Geske who testified that defendant told him that defendant had not been drinking after the accident. The court heard the testimony of Bruce Freisinger, the passenger in the car that was struck by the defendant. Freisinger testified that defendant was unsteady and smelled of alcohol. The court chose to overrule defendant's motion to suppress and admit the blood tests based on this evidence which suggested defendant was intoxicated at the time of the accident. Evidence is relevant if it renders the existence of fact more probable or less probable with it than without it; the relevancy of evidence is a matter of trial court discretion. Carter v. MacMillan Oil Co., 355 N.W.2d 52, 55 (Iowa 1984). The defendant has not shown that the trial court's ruling admitting the evidence was an abuse of discretion. The testimony offered was sufficient to raise a fair inference of guilt. See State v. Myers, 111 N.W.2d 660, 662 (Iowa 1961). The evidence suggested more than mere conjecture or speculation that plaintiff was intoxicated at the time of the accident. The admission of the evidence was well within the discretion of the trial court. This case is not like Creighton, supra, in which there was no evidence, other than that the defendant was intoxicated at the time of arrest, that the defendant was intoxicated at the time of the accident. State v. Creighton, 201 N.W.2d at 473. Here, relevant evidence was available as to the defendant's condition at the time of the accident.

II.

Defendant next contends that the trial court erred in denying his requested jury instructions on the OWI charge and the aid and information charge. The trial court is free to use its own language in jury instructions and need not use wording suggested by the parties. Knauss v. City of Des Moines, 357 N.W.2d 573, 577 (Iowa 1984). The instructions must fairly submit to the jury all factual issues which were properly pleaded and supported by substantial evidence.

Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 249 (Iowa), cert. denied, 454 U.S. 1086, 102 S. Ct. 645, 70 L. Ed. 2d 621 (1981). The defendant submitted the following instructions for submission to the jury on the OWI issue:

JURY INSTRUCTION NO. B

The law provides that to be guilty of the offense charged in Count I, operating a motor vehicle while under the influence of an alcoholic beverage, the Defendant must have actually been under the influence by reason of the consumption of an alcoholic beverage at the time when he is alleged to have been operating a motor vehicle as set forth in the complaint. It is not sufficient that the Defendant may have been under the influence of an alcoholic beverage at some time other than when he was operating a motor vehicle, whether it be either before or after that operation. Moreover, the fact that the Defendant was under the influence of an alcoholic beverage at the time when placed under arrest by peace officers, if you so find, without a showing of more, will neither support nor justify a finding that the Defendant was in that same condition when driving a motor vehicle at some earlier time. As always, it is the State's burden of proof to establish beyond all reasonable doubt that the Defendant was under the influence of an alcoholic beverage at the time of his alleged operation of a motor vehicle as charged in Count I; should the State fail in this its burden of proof, then you shall find the Defendant not guilty of Count I, however, if the State has sustained its burden of proof beyond all reasonable doubt, then it shall be your duty to find the Defendant guilty of Count I, operating a motor vehicle while under the influence of an alcoholic beverage.

JURY INSTRUCTION NO. C

In determining whether or not the Defendant was intoxicated at the very time he operated his motor vehicle on the date in question, if he did operate it, you should take into consideration the evidence so offered by all parties, and if in the light thereof taken in conjunction with all other facts and circumstances as disclosed by the evidence, you have a reasonable doubt as hereinbefore defined as to the guilt of the Defendant, then it will be your duty to acquit him.

If you find that the Defendant became intoxicated only after the motor vehicle collision allegedly involving the Defendant and Amy Saunders and Bruce Feisinger, then you will disregard all testimony as to the analysis of the blood taken from the Defendant on the occasion

> following his arrest and the testimony of those individuals regarding the Defendant's conditions and actions at the time of his arrest and thereafter, and you will give such evidence no consideration in your deliberation in this case.
>
> If the Defendant's alleged consumption of alcohol subsequent to the motor vehicle collision allegedly involving himself, Amy Saunders and Bruce Freisinger, creates a reasonable doubt as to whether the Defendant was intoxicated while operating his motor vehicle, then you should acquit the Defendant. However, if no such reasonable doubt is created and it is your finding that the Defendant was intoxicated at the time he was operating his motor vehicle as alleged, then it shall be your duty to find him guilty of Count I.

The court did not use the above instructions. Instead, the court used the following instruction:

> You must find the defendant not guilty of the offense charged in Count One of the Trial Information, Operating a Motor Vehicle While under the Influence of an Alcoholic Beverage, unless the State proves by evidence beyond a reasonable doubt each of the following elements:
>
> (1) That on or about February 9, 1985, the defendant, Larry Walter Slaymaker, operated a motor vehicle.
>
> (2) That at the time, the defendant was under the influence of an alcoholic beverage.
>
> If you find the State has proved beyond a reasonable doubt each one of the elements, then you will find the defendant guilty; but, if the State has failed to prove beyond a reasonable doubt one or more of the elements, then you shall find the defendant not guilty.

Though terse, the above instructions present to the jury all the relevant issues, including the issue of intoxication at the time of the operation of the vehicle. When the issues are fairly covered, the trial court may draft jury instructions in its own way. Bossuyt v. Osage Farmers National Bank, 360 N.W.2d 769, 774 (Iowa 1985). Given our disposition of the next issue raised on appeal by defendant, we do not here reach defendant's contention that the jury instruction misdirected

the jury on the charge of failing to render aid or information following an accident.

III.

Defendant next contends that the district court erred in denying his motion for a directed verdict of acquittal and his motion for a new trial. Iowa Rule of Criminal Procedure 18(8)(a) provides that the court on motion of defendant or on its own motion shall order the judgment of acquittal of one or more of the offenses charged after evidence on either side is closed if the evidence is insufficient to sustain a conviction for any of the charges. A trial court should not direct a verdict if there is any substantial evidence reasonably tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). The evidence must be sufficient to raise a fair inference of guilt and must be more than a suspicion, speculation, or conjecture. State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976). In this case, there was sufficient evidence which, if believed by a jury, would result in a finding of guilt of the OWI count. There was testimony from Officer Geske and from Freisinger; there were blood test results; and there was the defendant's admission of drinking before the accident.

However, we cannot agree that there was sufficient evidence to present to the jury that defendant was guilty of the information and aid charge. The evidence was uncontradicted that the defendant was physically assaulted at the accident scene. Freisinger testified that he wanted to "finish off" the defendant. No substantial evidence was presented that the defendant was unjustified for noncompliance with the reporting requirements of Iowa Code section 321.263 (1985) when he fled to escape the menace of serious injury. See Iowa Code section 704.10 (1985). Furthermore, the State has the obligation of showing either that the defendant was aware that an injury had occurred or showing that the accident was of such a nature that one would reasonably anticipate

that it resulted in injury to a person. State v. Miller, 308 N.W.2d 4, 7 (Iowa 1981). The State did not show that defendant was aware of any injury. We also think that when a person emerges from a struck car and actively demonstrates no sign of physical injury it is not reasonable to impose upon the defendant the reasonable anticipation that someone else in the car was injured. It is also not reasonable to think that Freisinger's yelling at defendant while kicking defendant while defendant was on the ground was communicative of the fact that an injury had occurred. The defendant was arrested shortly after the accident. We affirm the denial of a directed verdict for acquittal on the OWI count; however, we reverse the trial court's ruling that there was sufficient evidence to submit the information and aid charge to the jury.

Rule 23(2)(b) of the Iowa Rules of Criminal Procedure states the grounds on which the court may grant a new trial to a defendant. Trial courts have broad discretion in granting or denying new trials. State v. LaDouceur, 366 N.W.2d 174, 178 (Iowa 1985). We will reverse a ruling on a new trial only on a showing of an abuse of discretion. State v. Pletka, 310 N.W.2d 525, 529 (Iowa 1981). The jury's verdict on the OWI charge was not contrary to the evidence and we find no abuse of discretion in the court's refusal to grant a new trial on the OWI issue. Since we have found above that a judgment of acquittal should have been ordered by the court on the aid and information charge, we do not reach the issue of a new trial on that charge.

IV.

The defendant finally charges that the trial court abused its discretion in its sentencing of the defendant. Trial courts have wide discretion in making sentencing determinations. State v. Wright, 340 N.W.2d 590, 593 (Iowa 1983). Upon review, the sentencing court cannot be held to have abused its discretion unless the discretion was exercised for untenable or unreasonable grounds. State

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v. Buck, 275 N.W.2d 194, 195 (Iowa 1979). The sentence given to defendant on the OWI charge was well below the maximum sentence available. We find no abuse of discretion in the sentencing on this charge. We do not discuss the sentencing issue on the aid and information charge.

Defendant's conviction and sentence for violation of Iowa Code section 321.281 (1985), is affirmed. His conviction and sentence for violation of Iowa Code sections 321.261 and 321.263 (1985) is reversed. The case is remanded for the entry of an order of dismissal of that charge.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.