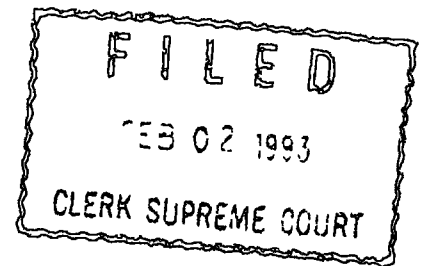


IN THE COURT OF APPEALS OF IOWA

No. 2-653 / 91-1715



STATE OF IOWA,

Appellee,

vs.

PATSY ANN METCALF,

Appellant.

Appeal from the Iowa District Court for Dubuque County,
Randal J. Nigg, Judge.

Defendant appeals from a judgment and sentence entered by the district court following her conviction for OWI, second offense, in violation of Iowa Code section 321J.2 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Elizabeth E. Quinlan, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Richard E. Ramsey, Assistant Attorney General; Fred H. McCaw, County Attorney; and Michael Whalen, Assistant County Attorney, for appellee.

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

DONIELSON, J.

The defendant, Patsy Ann Metcalf, appeals the judgment and sentence entered by the district court following her conviction for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (1991).

On February 12, 1991, two police officers stopped Metcalf after they observed her vehicle travel at a high rate of speed and cross the center line. After Metcalf exited the vehicle, the officers detected the smell of alcohol on her breath and Metcalf appeared to be unsteady. Metcalf also admitted she had been drinking. The officers called the Alcohol Safety Action Program vehicle (ASAP), used when a vehicle is stopped and the officer suspects the driver has been drinking. Officer Pregler, the ASAP officer, then performed several field sobriety tests on Metcalf. Although Metcalf performed satisfactorily on several tests, she failed the digital dexterity test and the horizontal gaze nystagmus test. After a preliminary breath test was performed, Metcalf was arrested for operating a vehicle while intoxicated. Metcalf was then transported to the Law Enforcement Center. Officer Pregler explained the implied consent advisory and requested Metcalf consent to an intoxilyzer test. Metcalf refused and her driver's license was subsequently revoked.

On September 29, 1991, a jury trial was held. During the trial, Officer Pregler testified he had administered a preliminary breath test to Metcalf. Out of the jury's

presence, Metcalf moved for a mistrial. The district court overruled Metcalf's motion, but admonished the jury to disregard Officer Pregler's answer concerning the preliminary breath test.

Officer Pregler was also asked to explain the implied consent statute and the revocation periods applicable to a person who either failed the breath test or refused to consent. Officer Pregler stated Metcalf "was under suspension as it was, so she would remain under suspension." Metcalf objected to this testimony and again moved for a mistrial. The trial court overruled Metcalf's motion, holding the probative value of the evidence outweighed the prejudicial effect.

Metcalf was found guilty as charged and was sentenced to sixty-seven days in jail, all but seven suspended, and \$750 in costs. In lieu of the fine, Metcalf was ordered to perform ninety hours of community service.

Metcalf now appeals. Metcalf argues the district court erred in: (1) denying her motion for a mistrial concerning the admission of evidence that a preliminary breath test was administered, and (2) overruling her objection and motion for a mistrial based on the admission of evidence that her driver's license was currently under suspension at the time of her arrest. On our review, we affirm the district court.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. On evidentiary issues, we review

for an abuse of discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). 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, 326 A.2d 138, 140 (Vt. 1974)).

I. Evidence of the Preliminary Breath Test. Metcalf contends the district court erred in overruling her motion for a mistrial after the jury heard evidence that a preliminary breath test was administered to her.

Iowa Code section 321J.5 (1991) states, in relevant part:

The results of [the] preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request a chemical test authorized in this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Iowa Code § 321J.5 (1991) (emphasis added). Our supreme court has held evidence that the preliminary screening (or breath) test indicated the presence of alcohol on the defendant was inadmissible, and the admission of that evidence constituted reversible error. State v. Deshaw, 404 N.W.2d 156, 157-58 (Iowa 1987).

In determining whether Officer Pregler's reference to the preliminary breath test contravened the above statutory language, the specific testimony of Officer Pregler must be considered. Officer's Pregler's testimony was as follows:

Q: (Prosecutor) Did you have the defendant do any other sobriety tests? A: (Officer Pregler) I administered a preliminary breath test.

Q: Okay. All right. Well --

Defense counsel: Your honor, I'd like to approach the bench please?

The court: Yes.

Metcalf contends Officer Pregler's reference to the preliminary breath test left the jury with the inference that the preliminary breath test administered to Metcalf had a positive result. . Therefore, Metcalf contends the introduction of this testimony was in violation of Iowa ode section 321J.5 (1991).

Iowa Code section 321J.5 clearly prohibits only the use of the "results" of a preliminary screening test in a court action. Here, we find no facts or evidence which could reasonably be considered a "result" of the preliminary screening test administered to Metcalf. The mere mention of the fact a test was administered does not violate section 321J.5. We affirm the district court in this regard.

II. Evidence of Metcalf's Suspended Driver's License.

Metcalf also contends the district court abused its discretion in admitting evidence that Metcalf's driver's license was under suspension at the time she was arrested. Metcalf specifically contends such evidence was inadmissible pursuant to Iowa Rules of Evidence 403 and 404(b).

Iowa Rule of Evidence 404(b) provides that evidence of other "crimes, wrongs or acts" is admissible to prove the defendant acted in conformity with the character the acts may show, but it is admissible for other purposes. In other words, evidence which has no relevancy except to show the defendant is more likely to have committed the crime charged because he is a bad person is inadmissible. State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979). The exceptions to rule 404(b) are based upon the relevancy of certain evidence to the proof of some fact or element in issue other than the defendant's criminal disposition. Id. However, the purposes listed in rule 404(b) are not exclusive. State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1988).

The admissibility of rule 404(b) evidence is essentially determined by a two-part test: first, the evidence must be relevant to establish a legitimate issue in the case; and second, the danger of unfair prejudice must not outweigh the probative value of the evidence under rule 403. See id. at 187, n.2.

At trial, Metcalf contended she was not driving the vehicle and therefore could not be convicted of OWI. The fact Metcalf's driver's license was under suspension tends to establish Metcalf had a motive to claim she was not driving. We find this evidence clearly affected the credibility of Metcalf's testimony. Furthermore, we find the danger of any unfair prejudice from this evidence did

not outweigh its probative value. The district court did not abuse its discretion in admitting this testimony.

The costs of this appeal are taxed to Metcalf.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.