

IN THE COURT OF APPEALS OF IOWA

No. 5-379 / 94-1042

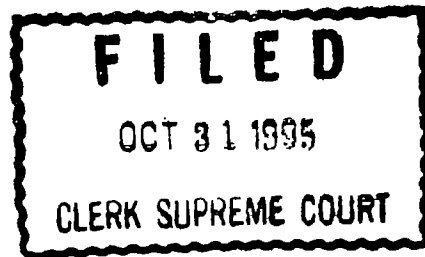
STATE OF IOWA,

Plaintiff-Appellee.

vs.

RONALD EDGAR WHITMORE,

Defendant-Appellant.



Appeal from the Iowa District Court for Warren County, John P. Crouch,
Associate District Judge.

Defendant appeals his conviction and sentence for operating a motor vehicle while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (1993). **AFFIRMED.**

Michael J. Burdette of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines,
for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney
General, Kevin Parker, County Attorney, and Douglas Hammerand, Assistant County
Attorney, for appellee.

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

On the morning of September 3, 1993, just outside of Carlisle, a car driven by Ronald Whitmore swerved off of Highway 5 and into a ditch. Several witnesses observed Whitmore driving erratically prior to the accident. When law enforcement officials arrived at the scene, Whitmore was given and failed two field sobriety tests. Whitmore's speech was slurred and he appeared to be confused and disoriented. No alcohol or drugs were found in Whitmore's possession. Officers did not detect any alcohol on Whitmore's breath. Whitmore was then arrested and transported to the Warren County jail. Whitmore consented to a breath test which indicated there was no alcohol in his system. He also consented to a urine sample, but was unable to provide a sample. Whitmore's failure to provide a urine sample was deemed a refusal to submit to a urinalysis.

On September 17, 1993, Whitmore was charged by trial information with Operating While Intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (1993). Whitmore pleaded not guilty.

The jury returned a verdict of guilty. Whitmore subsequently filed a motion for new trial and a motion in arrest of judgment. The district court overruled these motions.

Whitmore appeals.

The scope of review is for errors at law. Iowa R. App. P. 4.

I. *Sufficiency of the Evidence.* Whitmore contends there was insufficient evidence to establish he was under the influence of either alcohol or drugs at the time he was operating the motor vehicle.

In sufficiency of the evidence challenges, we review the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16).

A verdict is to be upheld where there is substantial evidence to support the charge. *State v. Smith*, 508 N.W.2d 101,102 (Iowa App. 1993). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.*

There was evidence presented at trial concerning how Whitmore was driving his car prior to driving into the ditch. Donna Bagley witnessed Whitmore continually crossing the center line. Bagley also witnessed other cars trying to avoid Whitmore's car. Krista Bennett also testified to Whitmore's erratic driving. Bennett was driving in the opposite direction of Whitmore when she came upon Whitmore's car. Bennett observed Whitmore drive into her lane, bounce off the shoulder on her side of the road back into his lane, drive onto the shoulder on his side of the road, and then lose control of the car and drive it into the ditch. Rick and Claudea Place witnessed

Whitmore driving on the wrong side of the road and almost causing an accident with a third car.

There was also testimony regarding how Whitmore behaved after driving into the ditch. Bennett pulled off the road to check on Whitmore. Bennett testified Whitmore kept falling down and lost his balance as he walked around the car to inspect it. Whitmore told her he had just gotten off work in Des Moines and had fallen asleep behind the wheel.¹ Bennett also testified Whitmore's speech was slurred and he had trouble maintaining his balance. Assistant fire marshalls John Ticer and John Guzman were the first law enforcement officers to arrive at the scene. Ticer stated Whitmore had a difficult time standing and he stumbled as he walked. Ticer described Whitmore as confused and disoriented. Ticer testified Whitmore's speech was slurred.

Deputy sheriff Carl Turner administered field sobriety tests. Whitmore failed both the Rhomberg test² and the walk-on-the-line test.³ Turner found Whitmore's

¹ Bennett also stated Whitmore was driving toward Des Moines at the time of the accident.

² The Rhomberg test is performed by putting the feet together with the arms out horizontally and the head tilted back. Whitmore failed this test because he was swaying.

³ Ticer, who was trained to perform field sobriety tests, witnessed Whitmore taking the walk-on-the-line test. Ticer testified it was also his opinion Whitmore failed the test. Turner stated Whitmore failed this test because he was swaying unsteadily and losing his balance.

speech to be slow and slurred. Turner testified Whitmore's pupils were constricted at the time of the arrest.

Whitmore also made a number of inconsistent statements at the time of the accident. Whitmore told both Bennett and Ticer he was on a return trip from Des Moines. Whitmore told Turner he had left Sioux City at 7:00 a.m. that morning and that he had made a couple of stops along the way. However, at the time of the accident, Whitmore was driving toward Des Moines. When Turner asked Whitmore what time it was, Whitmore stated it was 5:30 p.m. The time was actually between 11:00 a.m. and noon. When Whitmore was asked the last time he had eaten food, Whitmore responded he thought it was around 2:00 p.m. on September 3. It was around 11:00 a.m. on September 3 when he made this statement.

Evidence of defendant's driving prior to the accident may be used to prove he was intoxicated. *State v. Dominguez*, 482 N.W.2d 390,392 (Iowa 1992). The lack of a chemical test does not mean the evidence is insufficient to prove intoxication since intoxication can be proved by circumstantial evidence alone. *See e.g. State v. Walker*, 499 N.W.2d 323 (Iowa App. 1993); *State v. Pieper*, 432 N.W.2d 701 (Iowa App. 1988).

In addition, it is the function of the jury to sort out conflicting evidence and place credibility where it belongs. *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984); *State v. Metcalf*, 260 N.W.2d 857, 860 (Iowa 1977); *State v. McCullough*, 226 N.W.2d 216, 217 (Iowa 1975). The jury was not required to believe defendant's

testimony. *State v. Erving*, 346 N.W.2d 833, 835 (Iowa 1984); *Walker*, 499 N.W.2d at 325.

When viewing the evidence in the light most favorable to the State, we find there was substantial evidence to the charge of driving while intoxicated. Whitmore's sufficiency of the evidence claim is without merit.

II. *Opinion Testimony.* Whitmore contends the district court erred in admitting testimony by Turner regarding Turner's opinion as to whether Whitmore was under the influence of drugs. Turner was allowed to testify he felt Whitmore was under the influence of some type of drug.

Whitmore makes a few arguments on appeal. First, Whitmore asserts Turner should not have been allowed to testify to whether Whitmore was under the influence of drugs since Whitmore's drug intoxication was a legal conclusion solely within the province of the jury. Second, Whitmore contends the State did lay the proper foundation for allowing Turner to testify as an expert witness regarding people under the influence of drugs. The State does not dispute, and the district court specifically found, Turner's testimony should not be considered expert opinion testimony since the proper foundation was not laid. Last, Whitmore argues it is improper for a lay witness to give opinion testimony as to whether a person was observed to be under the influence of drugs.

Whitmore's first contention regarding the invasion of the province of the jury is without merit. Lay or expert witnesses may testify to an "ultimate fact which the

jury must determine.” *State v. Murphy*, 451 N.W.2d 154, 156 (Iowa 1990). We will consider Whitmore’s final two contentions under this issue together.

The law in Iowa is clear that a lay witness may provide opinion testimony regarding a person’s sobriety, provided the testimony is based upon a personal observation made by the witness of the other person. *Murphy*, 451 N.W.2d at 155; *State v. Davis*, 196 N.W.2d 885, 893 (Iowa 1972). The question before us, however, deals with drug intoxication. There is no case law in Iowa considering the issue of whether a lay witness may provide opinion testimony regarding a person’s drug intoxication.

Some states allow lay witnesses to provide opinion testimony on drug intoxication. *E.g.*, *Harris v. District of Columbia*, 601 A.2d 21 (D.C. 1991); *State v. Meanor*, 863 S.W.2d 884 (Mo. 1993); *State v. Lesac*, 437 N.W.2d 517 (Neb. 1989); *State v. Lindley*, 210 S.E.2d 207 (N.C. 1974). Other states do not allow such testimony. *E.g.*, *People v. Jacquith*, 472 N.E.2d 107 (Ill. App. 1984); *State v. Rifkin*, 438 A.2d 1122 (Vt. 1981).

While our supreme court has not had the opportunity to provide guidance on this issue, we find this to be of no consequence. Even if the testimony were improper, there was insufficient prejudice to warrant a reversal. Given the substantial evidence discussed previously in the sufficiency of the evidence issue, we find Whitmore could not have been prejudiced by the disputed testimony given by Turner, even if it were to be deemed inadmissible.

III. *Failure to Submit to Urinalysis.* In a pretrial oral motion, the defense attorney asked for a ruling barring the State from advising the jury or commenting on Whitmore's failure to provide a urine sample. The motion was denied. Whitmore has two related issues on appeal. First, Whitmore contends the district court erred in overruling his motion in limine. Second, he contends the district court erred in declining to hold an evidentiary hearing to determine whether Whitmore willfully refused to submit to a urinalysis.

Although it is questionable whether an evidentiary hearing was even expressly requested, we find the district court properly declined to hold such a hearing. The issue of Whitmore's compliance with the request for testing was a question of fact for the fact finder. *Bankson v. Iowa Dept. of Transp.*, 444 N.W.2d 515, 518 (Iowa App. 1989). We find the issue was properly determined to be a jury issue; therefore, no evidentiary hearing was necessary.

We also find there was no error in the denial of the motion in limine. A denial of a motion in limine is not reversible error. *State v. Langley*, 265 N.W.2d 718, 720 (Iowa 1978). Error is committed, if at all, when the matter is presented at trial and the evidence is then admitted or excluded. *Id.* The evidence regarding Whitmore's alleged refusal to submit to urinalysis was presented to the jury. The appellate courts of this state have upheld cases where evidence of a defendant's failure to provide a requested specimen was admitted for a fact finder's determination of whether there was refusal. *State v. Hennessey*, 405 N.W.2d 846, 847-48 (Iowa 1987); *Hoppe v.*

Iowa Dept. of Transp., 402 N.W.2d 392, 393 (Iowa 1987); *McCrea v. Iowa Dept. of Transp.*, 336 N.W.2d 427, 429-30 (Iowa 1983); *Bankson*, 444 N.W.2d at 517-18. We find the evidence was properly put before the jury.

IV. Jury Instructions. Whitmore contends the district court erred in giving two particular instructions to the jury. Jury instruction number six provided:

The defendant was asked to give a urine sample so it could be analyzed to determine if there were drugs in the defendant's body. It is alleged 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.

Jury instruction number seven provided:

A person is "under the influence" when, by using drugs, one or more of the following is true:

1. His reason or mental ability has been affected.
2. His judgment is impaired.
3. His emotions are visibly excited.
4. He has, to any extent, lost control of bodily actions or motions.

Whitmore contends instruction six should not have been submitted to the jury and instruction seven should have been amended.⁴

Whitmore's objection to instruction number six was the instruction suggests to the jury the evidence proved the defendant's refusal as opposed to his inability to produce a urine sample. This instruction is derived from the uniform jury instructions.

⁴ Whitmore wanted the following sentence to be added to instruction seven: "You may not conclude from the mere fact that one or more of the foregoing characteristics exist, that the Defendant had consumed alcohol or drugs."

There is a reluctance by the appellate courts in this state to disapprove of a uniform instruction. *State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994); *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). We find no reason to disapprove of the instruction in this case. The instruction did not state there was a refusal. It stated it was alleged there was a refusal to give a sample. The jury was free, under the instruction given, to find there was no refusal but rather an inability on Whitmore's part to provide a sample. Further, the instruction simply instructs the jury it is permissible, not required, to consider any refusal by the defendant in reaching the verdict.

Instruction number seven was used to define the term "under the influence" and is also taken from the uniform instructions. We find the district court properly determined there was no need to further define the term "under the influence" through the use of Whitmore's suggested amendment. The instruction, as given to the jury, properly defines the term. We find no error.

Upon consideration of all issues raised on appeal, we affirm Whitmore's conviction.

AFFIRMED.