

IN THE COURT OF APPEALS OF IOWA

No. 6-802 / 96-747

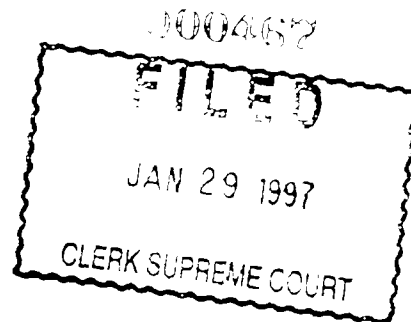
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JASON A. SAUGSTAD,

Defendant-Appellant.



Appeal from the Iowa District Court for Sioux County, Robert J. Dull, District Associate Judge.

Defendant appeals from the judgment and sentence entered upon his conviction for operating a motor vehicle while intoxicated, third offense. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock and John M. Priester, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Mark J. Schouten, County Attorney, and Timothy Rylaarsdam, Assistant County Attorney, for appellee.

Considered by Habhab, C.J., Huitink, and Vogel, JJ.

PER CURIAM

Defendant, Jason Saugstad, appeals from the judgment and sentence entered upon his conviction of operating a motor vehicle while intoxicated, third offense, in violation of Iowa Code section 321J.2 (1995). He contends the district court erred in denying his motion for mistrial based on improper comments by the prosecutor. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Jason Saugstad was arrested for operating a motor vehicle while under the influence (OWI). During opening statements of Saugstad's subsequent OWI trial, the prosecutor commented that the arresting officer had administered a preliminary breath test and that the test showed intoxication. Saugstad moved for a mistrial. The court denied the motion.

The court determined the prosecutor's statement was an improper comment on the "results of a preliminary screening test" under Iowa Code section 321J.5 (1995). The court "chastise[d] the State not to bring them up in its evidence." However, the court noted that the jury had been instructed that comments by the attorneys during opening statements were not evidence and concluded that the jury had not been prejudiced.

Saugstad was convicted as charged and now appeals. He contends the trial court erred in denying his motion for mistrial. We agree with the trial court that the prosecutor's comments were clearly an improper comment about the results of a preliminary screening test under section 321J.5. See *State v. Deshaw*, 404 N.W.2d

156, 158 (Iowa 1987) (“results” of a preliminary screening test include not only the actual test score but also an indication of the “presence or absence of any alcohol at all”) (interpreting Iowa Code § 321B.3, now codified at § 321J.5). The trial court correctly chastised the prosecutor.

Nonetheless, the question presented to this court is “whether the trial court abused its discretion in not granting the defendant’s motion for mistrial.” *State v. Zell*, 491 N.W.2d 196, 198 (Iowa App. 1992). An abuse of discretion is found “only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Hennessey*, 405 N.W.2d 846, 848 (Iowa 1987). The defendant must show that the prosecutor’s conduct deprived the defendant of a fair trial. *Id.*

We conclude that the trial court’s grounds for denying the motion for mistrial were not untenable or unreasonable. The jury was instructed that the attorneys’ comments during opening statements were not evidence. The State did not again mention the results of the preliminary breath test. There was overwhelming evidence to support the arresting officer’s request for a breath test following Saugstad’s arrest. In light of all the circumstances, the prosecutor’s comment did not deprive Saugstad of a fair trial. We affirm defendant’s conviction of operating a motor vehicle while intoxicated, third offense.

AFFIRMED.