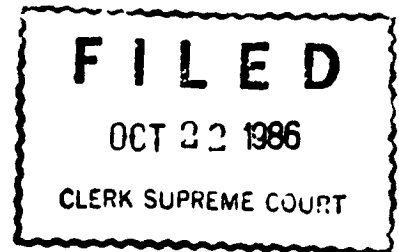


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
v.)
PAUL LaPAGLIA, JR.,)
Defendant-Appellant.)

Filed October 22, 1986

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6-189
85-951

Appeal from the Iowa District Court for Polk County (No. 26979) - Robert O. Frederick, Senior Judge.

The defendant in this appeal challenges his conviction and sentence for burglary in the second degree. **AFFIRMED IN PART; SENTENCE VACATED; REMANDED FOR RESENTENCING.**

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Christie J. Scase, Assistant Attorney General, for plaintiff-appellee.

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

OXBERGER, C.J.

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The defendant in this appeal challenges his conviction and sentence for burglary in the second degree. He asserts that the trial court erred: (1) in excluding certain testimony concerning his alcoholic history and prior episodes of alcohol-induced blackouts; and (2) in failing to state adequately its reasons for selecting the sentence imposed. We affirm in part and remand for resentencing.

I. EXCLUSION OF EVIDENCE

Our scope of review is on assigned error only, as this is a proceeding at law. Iowa R. App. P. 4. The admission or exclusion of evidence rests within the trial court's discretion, and we will interfere with its evidentiary rulings only if an abuse of discretion has occurred. State v. Williams, 367 N.W.2d 310, 312 (Iowa Ct. App. 1985).

The record discloses that sometime after 8:00 p.m. on November 2, 1984, the defendant broke the glass in one of the front doors of the Elm Street Market in West Des Moines and went inside. Shortly thereafter, several police officers arrived at the scene and found the defendant in a storage area in the back of the market. The officers testified that the defendant appeared to have been intoxicated.

At trial, the theory advanced by the defendant was that he was intoxicated and in an alcohol-induced blackout condition when the crime was committed; therefore, he could not have formulated the specific intent to commit a theft, which is an essential element of a burglary. The defendant's girl friend testified as to the events of November 2, 1984, and the amount of alcohol she had seen the defendant consume on that day. In addition, a friend of the defendant testified that he had seen the defendant in the Horseman's Lounge on the evening of November 2, and that he believed the defendant was intoxicated. The defendant also testified concerning the events of that day.

The final defense witness was Dr. Shahe Zenian, a clinical psychologist who evaluated the defendant pursuant to an order entered by the trial court. Dr. Zenian testified that the defendant had a history of progressive and continuous alcoholism. In addition, Dr. Zenian opined that, based upon the amount of alcohol reportedly consumed by the defendant on November 2, he was likely to have been at a stuporous level of consciousness at the time that the crime occurred; as such, the defendant would have been unable to formulate the requisite specific intent. Dr. Zenian further testified that the defendant indicated that he had experienced alcohol-induced blackouts on several occasions. Dr. Zenian then explained the nature and cause of such blackouts. He stated that the police officers' description of the defendant at the time of the arrest was consistent with that of an individual experiencing a blackout caused by the ingestion of alcohol.

In addition to the above testimony, the defense counsel attempted to introduce testimony from the defendant and his girl friend concerning his ongoing problems with alcohol and his previous alcohol-induced blackouts. The trial court excluded the testimony. The court stated that testimony from witnesses other than Dr. Zenian regarding the defendant's history of alcoholism "would not only be irrelevant, but would be purely inadmissible to prove or disprove any of the elements of the charge before the court...." It is the exclusion of this evidence that the defendant challenges in this appeal.

The following well-established principles govern our review of a trial court's determination concerning the relevancy of evidence:

The basic test of relevancy is whether the evidence offered would render the desired inference more probable than it would be without the evidence. Questions of relevancy and materiality rest largely within the sound discretion of the trial court.

State v. Watts, 244 N.W.2d 586, 589 (Iowa 1976) (citations omitted); see also

State v. Williams, 367 N.W.2d 310, 312 (Iowa Ct. App. 1985); Iowa R. Evid. 401.

We agree with the trial court's finding that the evidentiary question presented in this case is indistinguishable from that posed in State v. Watts, 244 N.W.2d at 589. The defendant in State v. Watts was convicted of robbery with aggravation. On appeal, he challenged the trial court's exclusion of testimony concerning his drinking activities prior to the date of the crime and several previous institutional commitments for his problems with alcohol. The defendant contended that such evidence was relevant to his insanity defense and whether his intoxication rendered him incapable of forming the intent to commit the crime charged. The supreme court held that the trial court properly excluded the evidence of the defendant's prior drinking activities . 244 N.W.2d at 589. We find this decision controlling. Accordingly, we conclude that the trial court did not abuse its discretion in excluding the proffered testimony.

Moreover, the defendant in the instant case was not prejudiced by the trial court's ruling. He was allowed to introduce testimony relevant to the fact at issue, his condition on November 2, 1984. In addition, even assuming arguendo that the excluded testimony was relevant to his defense, he was not prejudiced by its exclusion because it came into evidence through the testimony of Dr. Zenian. We have repeatedly recognized that no prejudice results when it is shown that the same evidence was admitted into the record at another time. State v. Windsor, 316 N.W.2d 684, 688 (Iowa 1982).

II. SENTENCING

The defendant next asserts that the trial court erred in failing to state on the record its reasons for selecting the particular sentence imposed as required by rule 22(3)(d) of the Iowa Rules of Criminal Procedure. We agree.

The courts of this state have recognized that when the trial court fails to comply with rule 22(3)(d), "the sentence must be vacated, and the case must

be remanded for amplification of the record and resentencing." State v. Marti, 290 N.W.2d 570, 589 (Iowa 1980); see also State v. Worley, 297 N.W.2d 368, 372 (Iowa 1980); State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979).

In the instant case, the trial court did not set forth any reasons for the sentence imposed. At the beginning of the sentencing hearing, the trial judge stated:

The court ordered a presentence investigation made in this case and that report has been filed with the court and the court has examined that presentence investigation with the addendums attached thereto and has made them available to counsel for examination.

Following a colloquy with both attorneys and the defendant, the court sentenced the defendant to ten years in prison, the maximum term of incarceration permitted under Iowa Code section 902.9(3).

The prosecution contends that the trial judge's statement set forth above represents adequate compliance with rule 22(3)(d). Although we have previously found the purposes of rule 22(3)(d) adequately fulfilled when a trial court stated its reasons in a terse and succinct manner, we do not think that the judge's mere reference to the presentence report rises to this level of compliance. The reference was not made in support of the sentence, nor did the judge at any time indicate what factors he relied upon in selecting the sentence. Accordingly, we conclude that the dictates of rule 22(3)(d) were not satisfied. Cf. State v. Victor, 310 N.W.2d 201, 205 (Iowa 1981); State v. Stanley, 344 N.W.2d 564, 568 (Iowa Ct. App. 1983).

The state argues that the trial court's failure to comply with rule 22(3)(d) is not an error in the instant case because the court's decision with regard to sentencing was limited by Iowa Code section 907.3(1), which makes the option of a deferred sentence unavailable when the defendant has previously been convicted of a felony. While we agree that the trial court could not grant a

deferred sentence, it had discretion to suspend the sentence and place the defendant on probation as authorized by Iowa Code section 907.3(2). We find this a sufficient reason to conclude that the sentence must be vacated and the case remanded for resentencing.

AFFIRMED IN PART; SENTENCE VACATED; REMANDED FOR RESENTENCING.