IN THE COURT OF APPEALS OF IOWA

No. 0-018 / 99-0093
Filed March 15, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TAMI MAY VAN BROCKLIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, Associate Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding her guilty of operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1997). **AFFIRMED.**

Lars G. Anderson of the Holland Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General, and Barbara A. Edmondson, County Attorney, for appellee.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

MAHAN, P.J.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding her guilty of operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1997). She contends (1) the district court abused its discretion by failing to grant her motion for a mistrial, (2) the district court erred in denying her motion for judgment of acquittal based on insufficiency of the evidence, and (3) she was denied effective assistance of trial counsel. We affirm.

Van Brocklin was stopped by a Washington police officer during the early morning hours of March 1, 1998, after he observed her vehicle weaving in its own lane and the passenger tires dropping off onto the shoulder of the road on two separate occasions. The officer observed Van Brocklin smelled strongly of alcohol, her speech was mumbled, and here eyes were bloodshot and watery. She was asked if she had been drinking and replied, "no." The officer then administered, with Van Brocklin's consent, five field sobriety tests. The tests consisted of the horizontal gaze nystagmus, the ABC test, the five-finger count, the walk and turn test, and the one-legged stand. She was then arrested for operating while intoxicated based on the officer's observations and Van Brocklin's performance on the field sobriety tests. She later refused the request for a breath test.

The matter proceeded to trial, and the jury returned a verdict of guilty to operating while intoxicated. Van Brocklin then stipulated on the record she had a prior offense for operating while intoxicated. She was sentenced on the charge of operating while intoxicated, second offense, and now appeals.

I. Motion for Mistrial. Review is for correction of errors at law. Iowa Rule of App. P. 4. The district court has broad discretion in ruling on motions for mistrial, and reversal is proper only when an abuse of that discretion is shown. *State v. Veal,* 564 N.W.2d 797, 809 (Iowa 1997).

Following Van Brocklin's arrest, an audiotape was made of the formal arrest, booking procedure, and request for a breath test. Defense counsel was in possession of this tape for several months prior to trial and objected to portions thereof which the State agreed to redact. The State edited the tape and deleted those portions objected to by defense counsel. In addition, Van Brocklin filed a motion in limine seeking to exclude any evidence of her prior operating while intoxicated conviction. The motion was granted by the district court.

The redacted audiotape was admitted as State's Exhibit 2 and was then played to the jury.[1] Trial was then recessed and defense counsel moved for a mistrial on the grounds the audiotape included a discussion about the applicable period of license revocation if Van Brocklin refused to take the breath test or failed to pass it.[2]

Van Brocklin argues the discussion on the audiotape must be viewed in combination with the implied consent advisory which was admitted as State's Exhibit 1. She claims the advisory contained boxes to be checked indicating the applicable period of license suspension. It is her contention the content of these boxes which refer to "Test Refusal 1st" and "2nd or subseq." and the checkmarks

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[1] The jury was also given a transcript of the audiotape.

[2] Defense counsel did not specifically object to the playing of the audiotape to the jury. He objected only on an unrelated matter.

therein, when considered in combination with State's Exhibit 2, would lead a juror to "quickly and easily" determine Van Brocklin had a prior operating while intoxicated conviction. We disagree.

First and foremost, State's Exhibit 1 that was submitted to the jury and is now part of the district court file is different from State's Exhibit 1 as set out on page forty-four of the appendix. The Exhibit as portrayed in the appendix does contain the boxes and checkmarks complained of by Van Brocklin. However, State's Exhibit 1 which was submitted to the jury does not contain that information. Sections D, E, and F of the advisory are not contained therein. The generic language contained in State's Exhibit 1 would not lead a juror to "quickly and easily" determine Van Brocklin had a previous conviction for operating while intoxicated. We find no merit to this argument.

Secondly, Van Brocklin did not object to playing the audiotape to the jury or object to the transcripts which were provided to jurors at the time the audiotape was played.[3] Indeed, counsel specifically agreed to the transcripts. In addition, Van Brocklin specifically turned down the offer of a limiting instruction.

An objection to evidence must be made when the evidence is offered. *State v. Howard,* 509 N.W.2d 764, 768 (Iowa 1993). Van Brocklin has failed to preserve error on this issue.

II. Sufficiency of the Evidence. Van Brocklin contends the district court erred in denying her motion for judgment of acquittal. Specifically, she claims the evidence was insufficient to support the jury verdict. We disagree.

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[3] The transcripts were collected following the playing of the audiotape and were not allowed into the jury room for deliberations.

A challenge to the sufficiency of the evidence is reviewed for errors at law. Iowa Rule of App. P. 4; *State v. Randle,* 555 N.W.2d 666, 671 (Iowa 1996).

> In a sufficiency-of-evidence challenge we review all the evidence to determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. We view the evidence in the light most favorable to the State and draw all fair and reasonable inferences from all the evidence. We do not uphold a verdict on evidence that merely raises suspicion, speculation, or conjecture regarding guilt.

State v. Williams, 574 N.W.2d 293, 296 (Iowa 1998).

Van Brocklin's challenge to the sufficiency of the evidence centers around the officer's administration of the field sobriety tests. The officer administered the horizontal gaze nystagmus, the ABC test, and the five-finger count while Van Brocklin was still seated in her vehicle. The officer admitted, and the State concedes, this is contrary to his training but was apparently done because of inclement weather. Van Brocklin passed the ABC test but failed the others. The officer then administered the walk and turn test and the one-legged stand. Van Brocklin failed both of these tests. Van Brocklin further contends two of the five tests are "non-recommended."

The State argues Van Brocklin failed to preserve error because she did not move in limine or object at trial concerning the manner in which the tests were conducted. *Patchette v. State,* 374 N.W.2d 397, 401 (Iowa 1985). Instead, defense counsel conducted a lengthy cross-examination of the police officer. We disagree with the State's contention Van Brocklin failed to preserve error. Her motion for judgment of acquittal challenged the sufficiency of the evidence as a whole. We do, however, agree with the State the method by which the tests

were administered goes to the weight of the evidence and not its admissibility. Any challenge to its admissibility was certainly waived.

In addition to the field sobriety tests, the officer observed Van Brocklin weaving in her own lane, the passenger tires dropping off onto the shoulder, the strong smell of alcohol, speech problems, and bloodshot and watery eyes. Evidence was also presented Van Brocklin drove three-fourths of a mile before fully stopping for the patrol car. She initially denied drinking and later admitted to it. Finally, the audiotape supplied additional evidence of her intoxication. We conclude the district court did not err in failing to grant her motion for judgment of acquittal. Substantial evidence in the record supported the jury verdict. *State v. Arnold,* 543 N.W.2d 600, 602 (Iowa 1996).

III. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily, we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). However, we will resolve ineffective-assistance-of-counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). The record in this case is adequate to decide this issue.

Van Brocklin bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Van Brocklin establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

We have carefully reviewed the record in this case and conclude Van Brocklin has failed to establish the prejudice prong. It is unnecessary to determine if counsel failed in an essential duty.

AFFIRMED.