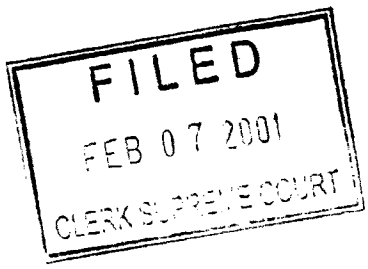
IN THE COURT OF APPEALS OF IOWA

No. 0-750 / 00-514
Filed February 7, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILEY GARY FRANKLIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Defendant appeals from the judgment and sentence entered upon jury verdicts finding him guilty of operating while intoxicated, third offense, operating a motor vehicle while license revoked and driving while license barred. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Steve Norby, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Defendant appeals his convictions and sentences for operating while intoxicated (OWI) third offense, in violation of Iowa Code section 321J.2 (1999); operating while license revoked, in violation of section 321J.21; and driving while license barred, in violation of sections 321.560 and 321.561. He claims (1) he was denied effective assistance due to trial counsel's failure to object to the admission of hearsay evidence and to specify appropriate grounds in his motion for directed verdict; (2) the trial court should have granted his motion for mistrial; and (3) his conviction for OWI was not supported by sufficient evidence. We affirm on appeal.

On July 18, 1999, as Dovien Anderson was driving in Waterloo, a car swerved into her lane and the vehicles collided. Glenn Tate, Anderson's step-father, came to the scene shortly after the accident. He saw a man get out of the driver's side of the other vehicle. Tate approached the man, and smelled an odor of alcohol. He noticed the man was weaving. Tate could not later identify this person. He did not see anyone else in the area.

Officers James Noss and Daniel Fredericksen responded to the accident call. Officer Noss discovered the other vehicle involved in the accident belonged to the deceased mother of Wiley Franklin. Franklin was at the scene of the accident. The police officers noticed Franklin had an odor of alcohol. Franklin's speech was slurred and his steps were uncertain. There were two cold, open beer cans in Franklin's car. Franklin refused to perform a breath test.

Franklin was charged with operating while intoxicated, third offense, driving while license barred, and operating while license revoked. A jury found

him guilty of these crimes. He was sentenced to a term of imprisonment not to exceed five years and ordered to pay a fine. Franklin appeals.

I. Ineffective Assistance

Franklin contends he received ineffective assistance because his trial counsel failed to object to hearsay evidence. During the trial, officer Noss testified Franklin's driver's license was barred. Officer Fredericksen testified Franklin's license was barred and revoked. The Department of Transportation records were not admitted into evidence. On appeal, Franklin asserts the officers' testimony concerning the status of his driver's license was hearsay. He claims he was prejudiced by his counsel's failure to object to this evidence.

Franklin also claims defense counsel should have made a general motion for judgment of acquittal. At the close of the State's evidence, defense counsel moved for a directed verdict of acquittal on the ground the State had failed to prove Franklin was operating a motor vehicle on July 18, 1999. In relation to his claim above, Franklin asserts there was insufficient evidence showing his license had been barred and revoked.

Claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings. *State v. Ceaser,* 585 N.W.2d 192, 195 (Iowa 1998). We ordinarily 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). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "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); *State v. Kirchner,* 600 N.W.2d 330, 335 (Iowa Ct. App. 1999).

We find the record before us is insufficient to address the issues of ineffective assistance of counsel raised on appeal. We preserve for postconviction proceedings the issues of ineffective assistance raised here .

II. Motion for Mistrial

During the direct examination of officer Fredericksen, the following exchange occurred:

> Q. Okay. And are you the individual that actually did the paperwork, called complaint I guess, that charged him [Franklin] with the offenses he's charged with? A. Yes.
> Q. And what did you charge him with? A. OWI Third Offense and I'll say several -- several other charges.

Defense counsel moved for a mistrial based on the officer's reference to the fact this was a third offense. The district court denied the motion for mistrial. Defendant refused the court's offer to immediately caution the jury to disregard the evidence, but agreed the court should give a cautionary instruction to the jury with the other jury instructions. The instruction was drafted by defense counsel and stated, "During the trial you may have heard evidence of other crimes. You're to give no consideration whatsoever to such evidence." On appeal, Franklin contends the district court abused its discretion in denying his motion for mistrial.

We review motions for mistrial for an abuse of discretion. *State v. Hardin,* 569 N.W.2d 517, 522 (Iowa Ct. App. 1997). An abuse of discretion will not be found unless the court exercised its discretion on grounds or for reasons clearly

untenable or to an extent clearly unreasonable. *State v. Roby,* 495 N.W.2d 773, 775 (Iowa Ct. App. 1992).

In most circumstances, a curative instruction is sufficient to enable the jury to complete its task without being improperly influenced by otherwise prejudicial testimony. *State v. Williamson,* 570 N.W.2d 770, 771 (Iowa 1997). A mistrial is necessary only when the evidence was so prejudicial its effect on the jury could not be erased by an admonition. *State v. Jackson,* 587 N.W.2d 764, 766 (Iowa 1998).

Franklin asserts the evidence he had been charged with OWI third offense was so prejudicial the curative instruction was not sufficient to erase its prejudicial effect. He relies upon *State v. Henning,* 545 N.W.2d 322, 325 (Iowa 1996), which held a defendant's motion for new trial should have been granted because jurors received outside information defendant had previous OWI convictions. The court gave a general admonition telling the jury not to consider information obtained from sources outside the courtroom, but no curative instruction was given. *Id.* at 324. Juror affidavits indicated, however, the jurors discussed the previous OWI convictions during deliberations. *Id.*

We find *Henning* is distinguishable from the present case. In *Henning,* there is no indication the jurors were specifically told not to consider evidence of other crimes. *Id.* There was evidence the jurors had in fact discussed defendant's previous OWI convictions. *Id.* In the present case, a cautionary instruction, drafted by defense counsel, was given, telling the jurors to disregard evidence of other crimes. A jury is presumed to have followed its instructions absent evidence to the contrary. *State v. McMullin,* 421 N.W.2d 517, 520 (Iowa

1988). Only in extreme cases will a cautionary instruction be deemed insufficient to remove the danger of prejudice. *State v. Plaster,* 424 N.W.2d 226, 232 (Iowa 1988). Our role in considering this issue is not to substitute our judgment for the trial court's, but to look for a clear abuse of discretion. We determine the district court did not abuse its discretion in denying the motion for mistrial under the circumstances presented here.

III. Sufficiency of the Evidence

Franklin asserts the State did not present sufficient evidence to show he was driving one of the vehicles involved in the accident on July 18, 1999. He points out no one saw him driving a vehicle. Franklin implies that because there were two open, cold beer cans in his car, there may have been another person in the car, who left before police officers arrived.

We review challenges to the sufficiency of the evidence for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.* We view the evidence in the light most favorable to the State, but consider all of the evidence, not just the evidence which supports the verdict. *State v. Jacobs,* 607 N.W.2d 679, 682 (Iowa 2000). Circumstantial and direct evidence are equally probative. *State v. Boley,* 456 N.W.2d 674, 679 (Iowa 1990).

There is sufficient evidence in the record to support defendant's conviction. Tate saw a man exiting the driver's side of one of the vehicles involved in the accident. Franklin was the only person seen near that vehicle.

The vehicle was registered to Franklin's mother, who was deceased. Although there were two open beer cans, they were both found on the floorboard on the driver's side of the vehicle. The evidence here is circumstantial in nature, however, circumstantial evidence will support a conviction. *See State v. Hopkins,* 576 N.W.2d 374, 377-78 (Iowa 1998).

We preserve for postconviction proceedings defendant's claims of ineffective assistance of counsel. We affirm his convictions for OWI, third offense, driving while license barred, and operating while license revoked.

AFFIRMED.