FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
HARVEY HENRY LECLAIRE,)
Defendant-Appellant.)

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Filed April 27, 1982

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Appeal from Woodbury District Court - D. M. Pendleton, Judge.

Defendant appeals from his convictions of involuntary manslaughter in violation of section 707.5, The Code and OMVUI in violation of section 321.281, The Code, asserting trial court erred: 1) in admitting evidence as to his blood alcohol content without proper evidence establishing that substances given intravenously to him did not contain alcohol; and 2) in failing to declare a mistrial based on the jury's consulting a dictionary as to the definition of "wanton" which was used in the court's instructions to the jury. AFFIRMED.

Francis C. Hoyt, Jr., and Patrick R. Grady, State Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and M. J. Blink, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Harvey Henry LeClaire, appeals from his convictions of involuntary manslaughter in violation of section 707.5, The Code, and OMVUI in violation of section 321.281, The Code. He claims that trial court erred: 1) in admitting evidence as to his blood alcohol content without proper evidence establishing that substances given intraveneously to him, prior to the withdrawal of the blood sample, did not contain alcohol; and 2) in failing to declare a mistrial based on the jury's consulting a dictionary as to the definition of "wanton" which was used in the court's instructions to the jury. We reverse and remand this case for a new trial.

The charges in this case stem from defendant's involvement in a motor vehicle accident which resulted in the death of the driver of the other vehicle involved in the accident. Relevant facts will be set forth in our discussion of the issues.

I. Scope of Review. Since this is an action at law, our review is on assigned errors only. Iowa R. App. P. 4.

II. Admissibility of Blood Sample. Defendant first asserts the trial court erred in admitting testimony as to his blood alcohol content without proper evidence establishing that substances given intraveneously to defendant, prior to withdrawal of the blood sample, did not contain alcohol. We disagree.

The relevant facts are as follows. A doctor who treated defendant at the hospital following the accident testified at trial that he signed a document indicating that defendant was unable to give his consent to the withdrawal of a blood sample. The doctor stated that prior to his signing the document, defendant had begun to receive intravenous fluids consisting of water. The State then called microbiologist Daniel Weakley, who testified that he had taken defendant's blood sample. On direct examination, Weakley testified as to the procedure he followed in obtaining the blood sample from defendant while defendant was nearly

unconscious. Counsel for the State attempted to examine Weakley about the test he performed for purposes of blood analysis. Defendant then sought, and was granted, permission to voir dire Weakley for the purpose of forming an objection. During voir dire, Weakley stated that he had no personal knowledge concerning what substance was intravenously given to defendant prior to the taking of the blood sample. Defendant then objected to any further testimony concerning the blood tests on the basis of lack of foundation. Trial court overruled the objection, following which Weakley testified that the tests performed on the blood sample indicated a .113% blood alcohol level.

The State first argues that defendant has not properly preserved error concerning admissibility of the blood test results because he failed to make an adequate objection. At trial, defendant made the following objection:

> Your Honor, at this time, we would object to the introduction of any further testimony regarding any blood tests by this witness, for the reason that it's clearly without foundation, and speculative, it's highly prejudicial to this defendant, and the state of the record.

There is no doubt that a general objection, such as "lack of foundation," is not sufficient to preserve error unless the record shows that the court and opposing counsel were apprised of the reason for the objection and thus had the opportunity to correct the error. State v. Janssen, 247 N.W.2d 260, 262 (Iowa 1976); State v. Kennedy, 224 N.W.2d 223, 227 (Iowa 1974); State v. Buckner, 214 N.W.2d 164, 167 (Iowa 1974). From our review of this record, we believe that the basis of defendant's objection was obvious from his voir dire of witness Weakley and that error was preserved.

Focusing on defendant's challenge, we find no merit in his assertion. Although his argument generally focuses on a challenge to the timeliness of the blood test, defendant's real challenge, as indicated by his objection, focuses on the intravenous substances which were administered to defendant for over an hour prior to Weakley's taking of the sample. He specifically states that:

> Where, as here, a suspect is receiving foreign substances into his blood before the sample is taken pursuant to § [sic] 321.B, The Code, a showing must be made as to what is being administered and its effect on the validity of the blood sample before it can be established that the sample was timely taken within the meaning of § [sic] 321.B, The Code.

The timeliness requirement as set forth in section 321B.3, The Code, provides, in part, that if a peace officer fails to provide a test within two hours after an arrest, no test shall be required. In this case, there is no dispute that the two hour requirement of section 321B.3 was met. Defendant was involved in a car accident at approximately 2:20 p.m. He was transported to the emergency room, where the blood specimen was withdrawn at 4:08 p.m. Defendant was arrested during the intervening period between the accident and the withdrawal of his blood specimen.

Finally, even assuming that the State was required, as part of its foundation, to show that the fluid administered to the defendant did not contain alcohol, we conclude the State established an adequate foundation. The doctor who administered the intravenous fluids testified that he had given defendant water. There is absolutely no evidence of the administration of any other fluid. We conclude this sufficiently establishes that the intravenous fluids being administered to the defendant during this time period did not contain alcohol.

III. Jury's Consulting the Dictionary. Defendant also alleges that trial court improperly denied his motion for a mistrial based on the jury's use of a dictionary during its deliberations.

Jury instruction no. 9, in part, states:

> A person is reckless or acts recklessly, when he willfully and wantonly disregards the safety of persons or property. It is more than a lack of reasonable care which may cause unintentional injury. Rather, recklessness is conduct, which is consciously done with willful or wanton disregard of the consequences, when a person knows or should know a risk of harm to another or property is created.

The record shows that after the jury retired for deliberation, one of the jurors asked the bailiff for a dictionary, which the bailiff delivered to the jury without prior knowledge of the court. The foreman of the jury testified that the jury used the dictionary to look up the definition of the word "wanton" or "wantonly" as used in instruction no. 9. He further stated that "[w]e didn't have the specific feel for what that word meant. Probably heard it used, but I didn't have any feel for that; so we called the bailiff and asked if it would be possible to get a dictionary so we could read the definition and see how that applied or not applied in this case."

Trial court has broad discretion in ruling on motions for mistrial based on jury misconduct. State v. Cuevas, 281 N.W.2d 627, 632 (Iowa 1979). Jury misconduct is a ground for a new trial under the following criteria:

> [I]f what occurred, however, amounted to misconduct and was of such a character that it likely did influence the result of the trial or this may be said to have been reasonably probable, it is enough, regardless of any such showing of such influence in fact, to invalidate the verdict and exact a new trial.

The unauthorized use of a dictionary by jurors as an aid in understanding words employed in the court's instructions has been considered in Harris v. Deere & Co., 263 N.W.2d 727, 732 (Iowa 1978); In re Estate of Cory, 169 N.W.2d 837, 846 (Iowa 1969); and Fagen Elevator v. Pfiester, 244 Iowa 633, 642, 56 N.W.2d 577, 582 (1953). Each case determined that there was a lack of prejudice from such occurrences sufficient to require the granting of a new trial.

In the present case, the words "wanton" and "wantonly" are used in a context within instruction no. 9 which renders it unlikely that an inappropriate definition of the words would have been selected from among the several definitions contained in the dictionary. Defendant has failed to show that the likelihood of prejudice was sufficient that the trial court abused its discretion in denying the motion for new trial based upon unauthorized use of the dictionary by the jury.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.

All judges concur except Johnson, J., who dissents.

JOHNSON, J. (dissenting)

I dissent. I believe the record in this case establishes a reasonable probability that the use of the dictionary by the jury did influence the result in this case. A key part of the defense was that defendant was not reckless in his driving. It was established at trial that the jury used Webster's Third New International Dictionary of the English Language Unabridged 2575 (1971) to research the definition of "wanton." The definitions contained therein include: "lacking discipline," "overindulgent," "frolicsome," "excessively playful," and "extravagent." In my opinion, several of the alternatives describe a standard of conduct which is far less serious than the type of disregard for the safety of others that is a necessary part of the recklessness element of involuntary manslaughter. As a result, I would conclude trial court abused its discretion in failing to grant a mistrial on this ground and would reverse defendant's conviction.