FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-055 / 94-754

STATE OF IOWA,

Appellee,

vs.

LAWRENCE A. KAUFMANN,

Appellant.

Appeal from the Iowa District Court for Muscatine County, James A. Weaver, District Associate Judge.

Lawrence A. Kaufmann appeals his conviction, following a jury trial, of operating while intoxicated, second offense. **AFFIRMED.**

David Scieszinski, Wilton, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Richard R. Phillips, County Attorney, and Christine Dalton, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Lawrence Kaufmann appeals his conviction of operating while intoxicated second offense in violation of Iowa Code section 321J.2(1)(a). We affirm.

Kaufmann was arrested on July 22, 1992, after police were informed he was "really staggering around and swerving all over the road." The arresting officer's observations of the defendant prior to arrest included signs of intoxication such as staggering, odors, and defendant's urine-soaked clothing. Kaufmann also failed a number of field sobriety tests. Since Kaufmann did not receive an intoxilyzer test, the State was unable to proceed under the theory that Kaufmann was presumptively intoxicated by virtue of his blood alcohol content, and he was accordingly charged under 321J.2(1)(a).[1]

During the opening statement by the State, a juror raised his hand and asked the following question:

> "I just wondered if he took a breathalyzer."
> THE COURT: You'll find that out.

During the direct examination of the arresting officer

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1. Iowa Code section 321J.2(1) provides:

> 1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions:
>
> a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.
>
> b. While having an alcohol concentration as defined in section 321J.1 of .10 or more.

by the county attorney, the following testimony was elicited:

> Q. What did you do next? A. I administered a preliminary breath test, and then I placed -- .
> MR. SCIESZINKSKI: Your Honor, I object to that and I ask opportunity to address the Court outside the presence of the jury.
> THE COURT: The results were not given. Overruled.
> BY MS. DALTON:
> Q. You subsequently arrested the defendant, correct? A. That's correct.

During cross-examination the defendant asked the following:

> Q. What time does Exhibit 1 say you arrested the defendant? A. 2221. I believe that's the time I requested a preliminary breath test.

During the redirect examination the State asked the following:

> Q. And would you still have been out on Noble Avenue at that time? A. At the time that I gave him P.B.T. yes.

On appeal Kaufmann contends the admission of this testimony under the circumstances of this case was prejudicial error. Our scope of review is for errors of law. Iowa R. App. P. 4.

On evidentiary issues we review for an abuse of discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons that are clearly unreasonable. State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976).

The results of preliminary breath testing are not admissible in any court action. Iowa Code § 321J.5 (1993) (formerly Iowa Code § 321B.3). This prohibition applies to results expressed in either numerical terms or as a positive or negative result. State v. Thompson, 357 N.W.2d 591, 593 (Iowa 1984); see also State v. Deshaw, 404 N.W.2d 156, 158 (Iowa 1987). Introduction of evidence of preliminary breath testing alone does not constitute reversible error. Gavlock v. Coleman, 493 N.W.2d 94, 96 (Iowa App. 1992).

The gist of Kaufmann's argument is the evidence of preliminary testing followed by evidence of arrest are the functional and legal equivalent of evidence of a test result. Exclusion of this evidence, he argues, is consistent with the legislature's concerns with the inherent unreliability of preliminary breath testing. Deshaw, 404 N.W.2d at 158. He also cites the particular prejudice resulting from admission of evidence of testing in cases where the State must prove intoxication without the benefit of intoxilyzer tests and the resulting presumption of intoxication.

Although we find significant merit in Kaufmann's argument, we believe the issues of relevance and prejudice implicated are more appropriately addressed by Iowa Rules

of Evidence 402[2] and 403[3] rather than section 321J.5. Unfortunately, Kaufmann's objection at trial was limited to the applicability of the statute, and we are unable to consider other grounds that were not raised at trial. State v. Taylor, 310 N.W.2d 174, 177 (Iowa 1981) (citations omitted).

Even if we assume for purposes of argument this evidence was excluded by section 321J.5, its admission at trial was not prejudicial. The record is replete with other evidence of Kaufmann's intoxication. Kaufmann's appearance, odor, and behavior provided sufficient evidence to convict. The jury's verdict would have been the same with or without evidence Kaufmann received a preliminary breath test. We do not believe Kaufmann's rights have been "injuriously affected" to the extent a reversal is required. State v. Massey, 275 N.W.2d 436, 439 (Iowa 1979).

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2. Iowa Rule of Evidence 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States or the state of Iowa, by statute, by these rules, or by other rules of the Iowa Supreme Court. Evidence which is not relevant is not admissible.

3. Iowa Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The admission of the preliminary breath test without express reference to a result was not an abuse of discretion. The judgment of the district court is therefore affirmed.

AFFIRMED.