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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
AMANDA ELAINE PALMER,	)	8-285 87-1141
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Wapello County (Cr5673-0187), Max H. Ruschmeyer, Judge.

Defendant appeals following her conviction in a jury trial of driving while intoxicated (OWI), first offense. **REVERSED AND REMANDED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

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Defendant Amanda Elaine Palmer appeals from a jury verdict and sentence entered upon her conviction of operating while intoxicated, first offense, in violation of Iowa Code section 321J.2(1)(a)(b) (1987). Palmer contends on appeal the trial court erred in numerous rulings on evidentiary matters. We reverse and remand for a new trial.

At trial the evidence presented before the jury in summary is as follows: On January 13, 1987, Palmer was stopped by an Ottumwa police officer when he observed her car traveling without its headlights on and viewed her roll through a stop sign. After pulling Palmer over, the officer noticed an odor of alcohol and believed defendant's eyes were bloodshot and watery. At this time he requested her to perform various field sobriety tests. Upon the completion of the tests the officer believed Palmer to be intoxicated and placed her under arrest. Upon reaching the police station, the officer advised Palmer of Iowa's implied consent law at which point the defendant consented to the breath test and a different officer performed two breath tests which results were admitted into evidence at trial.

On June 12, 1987, the jury returned a verdict finding Palmer guilty as charged. Later, judgment was entered on the conviction and Palmer was sentenced to serve ninety

days in the county jail with all but forty-eight hours of the term suspended and to pay a $500 fine. It is from this judgment which she now appeals.

II.

On appeal the defendant contends the trial court erred: (1) by admitting into evidence the results of two breath tests administered without compliance with required procedures; (2) by excluding photographic evidence of the scene of her arrest; (3) by refusing to allow her to give opinion testimony regarding her impaired eyesight; and (4) by failing to state on the record the reason for selecting the sentence imposed, as required by Iowa Rule of Criminal Procedure 22(3)(d).

III.

A. Admissibility of the Photographs. We first address defendant's assertion the trial court erred by not admitting various photographs which she offered to show the scene of the stop and arrest. At trial defense counsel made use of the photographs during his cross-examination of the arresting officer, Mark Hall. The photos were taken during the daylight hours, while the arrest occurred in the evening around 10:30 P.M. Officer Hall stated the photos all were accurate depictions of the intersections and views of the street which the defense sought to portray, with exception at the time of arrest it was dark, there were fewer cars parked on the street, and because the arrest

occurred ~~in~~ January, there was no greenery in the area. After laying this foundation, the defense moved the photos be admitted into evidence. The prosecution objected on the grounds the photos were an inaccurate depiction of the scene and improper foundation had been laid. The trial court sustained the objection at which time the defendant moved for a jury viewing of the scene, which the court also denied.

Iowa law holds photographs are admissible if they are illustrative of the testimony of witnesses. Maier v. Illinois Central Railroad Company, 234 N.W.2d 388, 394 (Iowa 1975). The fact that there are differences or changes in conditions will not necessarily exclude a photograph where the changes or differences are explained so that the photograph, as explained, will give a correct understanding of the condition existing at the time and be practically instructive. Id. (quoting 32 C.J.S. Evidence § 715, p.1012). The Iowa Supreme Court has articulated a two-part test which a proponent must meet to obtain admission of a photograph into evidence. First, the picture must be relevant to the controversy, which normally requires that the picture be identified in time and place and second, the picture must fairly represent what it shows. State v. Holderness, 293 N.W.2d 226, 230 (Iowa 1980). Conventionally, these foundation elements are shown by the direct testimony of a person who, although perhaps

not connected with the photography, observed the scene and testifies that the picture fairly shows it. Id. In addition, we note generally the admission or exclusion of photographic evidence is largely in the discretion of the trial court since it has the opportunity to examine the photographs and hear the evidence given by the witnesses. Maier, 234 N.W.2d at 394.

The State argues the district court reasonably could have concluded the dangers of unfair prejudice, confusion of the issues, or misleading the jury, as well as a consideration of undue delay, waste of time, or needless presentation of cumulative evidence, substantially outweighed any relevancy of the photographs. Without determining whether the State's possible rationale for excluding the photos are correct, we point out the trial court refused to admit the photos because it believed "they (the photos) do not truly depict the scene as it was on January 13, 1987, at the hour of approximately 10:30 P.M." We find this ruling was in error.

We believe the defendant laid the proper foundation for admission of the photos. The mere fact the photos were taken in the afternoon and not in the evening is not itself enough to make the photos inaccurate representations, so long as a witness, in this case Officer Hall, was able to verify the photos as accurate representations. Hartwig v. Olson, 158 N.W.2d 81, 85 (Iowa 1968). The differences in

the conditions were clearly pointed out by the witness: it was dark; less greenery existed around the street in January; and fewer cars were parked on the street during the evening. We do not believe these minimal variances make it unlikely the jury could not comprehend the actual scene of the arrest. Thus, we hold the photos were not inaccurate depictions of the scenes which they purported to identify and should have been admitted.

B. Defendant's Testimony Concerning Her Physical Condition and Capabilities. We next address defendant's argument that the trial court erred in excluding her testimony regarding her own impressions of her physical condition. The trial court would not hear testimony by the defendant concerning the percentage of vision loss in one eye, sustaining the prosecution's hearsay objection. In addition, the court would not let the defendant testify that, due to her vision problems, she had difficulty at times with her balance, a physical malady causing her difficulty effectively completing the field sobriety tests.

The Iowa Supreme Court has held that a nonexpert or lay witness may testify as to her own health or physical condition. She may state simple inferences drawn by her from her own conscious subjective sensations as to her physical condition and may testify as to the condition of her health and freedom from sickness at a particular time. Daniels v. Bloomquist, 258 Iowa 301, 138 N.W.2d 868,

874-875 (quoting 32 C.J.S. Evidence § 546(22)) (1965).

Iowa Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Using these principles to guide us, we determine the trial court erred in not admitting the proffered testimony. The case law makes it clear the defendant was qualified and should have been allowed to testify as to her own perceptions of her physical capabilities due to her diminished vision. We hold the testimony was admissible under either objection which the trial court sustained. We also determine under the principles set out here, the defendant should have been able to testify about the vision limitation of her left eye. We thus hold defendant's testimony was rationally based on her own perception and would have been helpful to a clear understanding of her testimony for the determination of a fact in issue and it was error for the trial court to sustain prosecution's objections to the testimony.

3. Prejudicial Error. We must now determine whether the errors discussed above were so prejudicial as to require a new trial. We find they were. Regarding the photographs, the arresting officer's testimony indicated he observed the defendant's vehicle run one stop sign and

failed to come to a complete stop at another, could have influenced the jury in concluding the defendant was driving while under the influence. The defendant hoped to use the photographs as a means of showing the officer could not have clearly seen whether or not the defendant's vehicle stopped at the stop signs. Thus, the photos were necessary to defendant's case in challenging and disputing the officer's credibility, reliability, and ability to observe and conclude the defendant had run the stop signs.

In addition, the trial court's rulings dealing with the defendant's vision problems and physical abilities and capabilities to perform the field sobriety tests were relevant and material to her defense and necessary for the jury to consider in making their determination as to whether she was under the influence of an alcoholic beverage at the time she was operating her motor vehicle. These two errors make it clear defendant was prejudiced by the jury not being able to consider the evidence not admitted.

We have reversed on the aforementioned issues and therefore we do not address defendant's additional issue regarding the admissibility of the intoxilyzer results, nor do we address defendant's issues regarding the infirmities of her sentencing proceeding.

This case is reversed and remanded for a new trial.

REVERSED AND REMANDED.