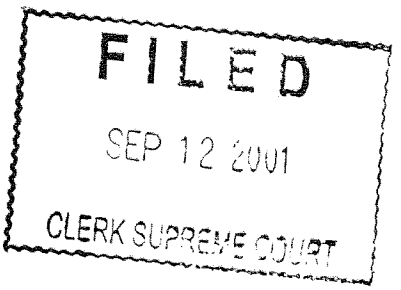
IN THE COURT OF APPEALS OF IOWA

No. 1-446 / 00-1294
Filed September 12, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY DALE TEMEYER,
Defendant-Appellant.

Appeal from the Iowa District Court for Buchanan County, J.G. Johnson, Judge.

Defendant appeals following his conviction for operating while intoxicated.

AFFIRMED.

Steven K. Ristvedt of Ristvedt Law Offices, P.C., Independence, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, Allan W. Vander Hart, County Attorney, and Andrea Dryer, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

HECHT, J.

Jeffrey Dale Temeyer appeals from a conviction of operating while intoxicated. He challenges the sufficiency of the evidence supporting the conviction and claims the district court erred by receiving an edited audiotape in evidence. We affirm.

I. Factual and Procedural Background. A reasonable fact-finder could find the following facts from the record in this case. On November 8, 1998, Temeyer served as a guide for a group of hunters. He met the group at approximately 5:00 a.m. and guided them to a duck blind. Because weather and hunting was not ideal that morning, Temeyer and the hunters decided to leave the blind about 11:00 a.m.

Temeyer then called Dean Siglin and Forrest Frost to inquire whether they would like to use the blind to hunt that afternoon while Temeyer cleaned it. The three gentlemen met at approximately twelve noon and traveled by boat to the blind, taking food and a quantity of beer with them. At approximately 6:30 p.m., the group disbanded. Temeyer placed trash and empty pop and beer cans removed from the blind in the back of his vehicle and drove toward his home.

A law enforcement officer approaching from the opposite direction clocked Temeyer's vehicle at sixty-three miles per hour in a fifty-five-miles-per-hour speed zone. The officer stopped Temeyer and detected the smell of alcohol emanating from Temeyer's vehicle. When asked if he had been drinking, Temeyer admitted he had consumed a couple of drinks. The officer noticed Temeyer's eyes were bloodshot and watery.

At the officer's request, Temeyer attempted several field sobriety tests including the horizontal gaze nystagmus test, the one-leg-stand test, and the walk-and-turn test. After observing the tests, the officer believed Temeyer had failed them all. Temeyer was arrested and transported to the Buchanan County Law Center. When tested on the Intoxilyzer 4011A machine, his blood alcohol content was measured at .167.

A jury convicted Temeyer of violating Iowa Code section 321J.2(1) (1997). On appeal, Temeyer contends (1) the conviction is not supported by sufficient evidence, and (2) the district court erred in admitting an edited audiotape of portions of his conversation with the arresting officer at the scene of the arrest.

II. Scope of Review. Where a defendant challenges the sufficiency of the evidence supporting a jury verdict, our standard of review requires us to uphold the verdict if there is substantial evidence to support it. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Evidence is substantial if it could convince a rational fact-finder the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Constable*, 505 N.W.2d 473, 478 (Iowa 1993). When considering sufficiency of the evidence challenges, we examine the evidence in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). We consider all evidence presented at trial, not just the evidence supporting the verdict. *Id.* All legitimate inferences and presumptions that can fairly and reasonably be deduced from the evidence are resolved in favor of the State. *State v. Blair*, 347 N.W.2d 416, 418-19 (Iowa 1984). The weight of the evidence and credibility of witnesses are to be determined by the fact-finder, as

this court's review of the evidence is not de novo. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984).

III. Sufficiency of the Evidence. Temeyer attempted to refute all evidence presented by the State. He presented evidence that only twelve cans of beer were taken to the duck blind on the day of the arrest; and his guests drank ten of them. Temeyer explained the smell of alcohol in his vehicle by noting he was transporting the empty beer cans in the back of his vehicle. He told the jury his eyes were watery and bloodshot at the time of the arrest because he had been outdoors much of the day in the cold, windy weather. Temeyer also offered he had difficulty with the horizontal gaze nystagmus test because the officer's car lights and flashlight bothered him. The officer conceded a small percentage of the population has jerking eye movement even if they have not consumed alcohol. In addition, Temeyer told the jury he had sustained a left ankle injury several years earlier, and this left him with diminished strength in the lower extremity and affected his ability to perform the one-leg-stand and walk-and-turn tests.

Temeyer's wife testified she did not detect an odor of alcohol about her husband when she arrived at the law enforcement center to transport him home that evening. Frost and Sigler testified they consumed ten of the twelve beers at the blind that afternoon and told the jury they saw no evidence Temeyer was under the influence of alcohol that day.

Despite his very thorough efforts to respond to the State's charges, the jury found Temeyer guilty. We find substantial evidence in the record from which a reasonable fact-finder could find the defendant guilty of the charge beyond a

reasonable doubt. The jury could believe the arresting officer's testimony about his observations of the odor of alcohol, the suspect's bloodshot and watery eyes, and poor performance of the various sobriety tests. Moreover, the jury could reasonably credit the intoxilyzer test result evidencing Temeyer's blood alcohol content of .167. Accordingly, because the weight of the evidence and credibility of the witnesses are matters for the jury's determination, we affirm on this issue.

IV. Admissibility of the Audiotape. The arresting officer's audiotape contained references to the preliminary breath test administered at the scene of the arrest.[1] The results of such tests are not admissible in evidence under Iowa Code section 321J.5(2), which reads:

> The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made or whether to request a chemical test authorized in this chapter, *but shall not be used in any court action* except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Iowa Code § 321J.5(2) (1997) (emphasis added); *see also State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987) (holding preliminary screening test results inadmissible due to their inherent unreliability); *State v. Thompson*, 357 N.W.2d 591, 594 (Iowa 1984) (requiring new trial for defendant whose preliminary breath test results were erroneously admitted at trial); *State v. Zell*, 491 N.W.2d 196, 197-98 (Iowa Ct. App. 1992) (holding the results of preliminary screening tests are inadmissible "because the test is inherently unreliable and may register an

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[1] The officer's vehicle was equipped with an audiotape system that captured a portion of the conversation between the officer and Temeyer. The officer administered a preliminary breath test that produced a test result of approximately .08.

inaccurate percentage of alcohol present in the breath, and may also be inaccurate as to the presence or absence of any alcohol at all"). The State filed a motion in limine requesting evidence of the test result be excluded. After editing the references to the result of the preliminary breath test from the audiotape, the State offered, and the district court received over Temeyer's objection, the tape in evidence.

On appeal, Temeyer contends the district court abused its discretion by admitting in evidence only portions of the audiotape selected by the State. He cites Iowa Rule of Evidence 106 for the proposition parts of the audiotape excised by the State were admissible because they were necessary in the interest of fairness, for a clear understanding of the occurrence, and in the interest of an adequate explanation of the transaction. We reject Temeyer's assertion this rule of evidence nullifies section 321J.5(2) and makes the audiotape references to the preliminary breath test admissible. Iowa Code section 321J.5(2) and our case law clearly prohibit the introduction of such evidence.

Furthermore, we find the district court did not abuse its discretion in connection with this evidentiary ruling. The court attempted to comply with section 321J.5(2) by allowing redaction of references to the preliminary breath test result. Temeyer does not identify any excised parts of the audiotape that should have been admitted because they did not refer to the preliminary breath test. Accordingly, we affirm the district court's evidentiary ruling.

AFFIRMED.