

IN THE COURT OF APPEALS OF IOWA

No. 6-300 / 95-0711

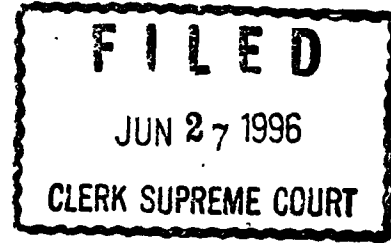
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JASON DAVID CARSON,

Defendant-Appellant.



Appeal from the Iowa District Court for Johnson County, David M. Remly,
Judge.

Defendant appeals from judgment and sentence, following a jury trial, entered
upon his convictions for homicide by vehicle and serious injury by vehicle.

AFFIRMED.

Jerald W. Kinnamon, Jon M. Kinnamon, J. Nicholas Russo, and J. Dean
Keegan of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
J. Patrick White, County Attorney, and Teresa Vens and Janet Lyness, Assistant
County Attorneys, for appellee.

Considered by Cady, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

Jason David Carson appeals his convictions for homicide by vehicle, in violation of Iowa Code sections 707.6A(1)(a) or (b) (1995), and serious injury by vehicle, in violation of Iowa Code section 707.6A(3), following a jury trial. He assigns numerous errors to the rulings made by the district court. We find all of them without merit and affirm his conviction.

On April 26, 1994, around 2 a.m., Carson left a bar in downtown Iowa City and drove two friends, Daniel Krouse and Michael Jones, toward North Liberty on a country road. The vehicle left the road at a curve known as York Corner and flipped upside down in the ditch. At trial, an expert witness for the State testified that Carson may have been driving as fast as 110 miles per hour at the time he lost control of the vehicle. Krause died from the injuries he sustained in the accident and Jones was seriously injured.

Carson suffered injuries as well and was taken to the University of Iowa Hospital and Clinics. While there, he refused to consent to chemical testing for intoxicants. Authorities later obtained a search warrant and took samples of Carson's blood and urine at approximately 6 a.m., about four hours after the crash. The test results showed Carson's urine had an alcohol concentration of .025 and contained 400 nanograms per milliliter of THC acid, a metabolite of marijuana. At the time of the test, Carson's blood sample had no alcohol level. Expert testimony at the trial indicated that using an average rate of alcohol elimination, Carson's blood alcohol

content could have been as high as .08 at the time of the accident. The expert also testified that a driver's ability to operate a motor vehicle would be impaired at that particular level. Testimony also indicated that the level of THC acid was about four times higher than the amount usually detected by state laboratory tests. However, the State's experts could not establish with any degree of scientific certainty that Carson was in fact under the influence of marijuana at the time of the accident. Carson made statements indicating he had not used marijuana since April 24, 1994, more than twenty-four hours before the accident, and that he had two or three beers the night of the accident.

I. Admissibility of Expert Testimony

Carson contends the district court ruling admitting the testimony of Calvin Rayburn, an expert witness for the State, violated his sixth amendment right to confrontation, constituted inadmissible hearsay, and lacked foundation. In his testimony, Mr. Rayburn, a chemist with the Iowa Department of Public Safety, described studies he conducted at Camp Dodge over a twenty-year period, the last one being conducted in 1983-84. In those studies, volunteers were tested beforehand to ensure they were free of alcohol. Then a series of tests involving reaction time, depth perception, and motor skills were conducted, including a test where participants drove an automobile through a course. The subjects then drank various amounts of alcohol over a certain time period. Samples of their blood, breath, and urine were collected.

The same skills tests, including the driving test, were given again to gauge the level of impairment after consuming the alcohol. The tests revealed that beginning at fairly low levels of alcohol, about a .04 or .05, an individual's driving ability became impaired.

Carson objects to the admission of this testimony because the data relied on in Mr. Raymond's conclusions has been destroyed and has never been published or submitted for critical review by similar qualified experts. Thus, the lack of recordation, Carson alleges, demonstrates a lack of foundation. Carson argues his right to confrontation was compromised by his inability to properly cross-examine the State's witness through use of the test results. Carson also argues the test results are unreliable and unauthenticated as there was no control group nor was an independent peer review of the study conducted.

The State responds that Mr. Rayburn used standard procedures for tests that have been the basis for many similar studies which have been published and are well known among the scientific community. The general acceptance of the standard techniques provides the foundation for the tests, and in any event, the accuracy of the data is a question of weight for the jury to decide, not a question of admissibility. Furthermore, Mr. Rayburn, who has a bachelor of science degree and has spent more than two decades testing for intoxication as a criminalist for the state crime laboratory testified from firsthand, personal knowledge about the observations he made during

the testing. Therefore, the State argues his statements cannot be characterized as inadmissible hearsay. Iowa Rule of Evidence 702 governs the admissibility of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

The trial court is allowed much discretion in determining admissibility of expert opinion. *State v. Buller*, 517 N.W.2d 711, 712 (Iowa 1994).

Iowa courts are committed to a liberal rule on admission of expert opinion testimony. *Ort v. Klinger*, 496 N.W.2d 265 (Iowa App. 1992). The question is not whether the particular test is the best available, but rather is whether the testimony will aid the trier of fact in resolving the particular issue. *State v. Nelson*, 480 N.W.2d 900 (Iowa App. 1991). The trial court must find that the evidence is reliable. *State v. Murphy*, 451 N.W.2d 154, 156 (Iowa 1986). Here, the district court acknowledged the fact that the data from the tests themselves were no longer available nor were the results ever published or subject to peer review. However, as the court indicated in the record, there is no absolute requirement that results be published in order to be admissible. See *Daubert v. Merrell Dow*, 509 U.S. ---, 113 S. Ct. ---, 125 L. Ed. 2d 469, 483 (1993). Furthermore, there is evidence indicating Mr. Rayburn utilized standard procedures widely known within the scientific community and he testified

based on his own first-hand observations of the subjects of the study.¹ *See Brunner v. Brown*, 480 N.W.2d 33, 34 (Iowa 1992). We find these factors provide sufficient indicia of reliability to support the district court's ruling admitting this evidence. Moreover, Carson was permitted to cross-examine the expert witness regarding the destruction of the data and the fact that there was no double blind study performed. The jury was accordingly free to decide how much weight to place on the accuracy of the study given the fact that it was performed over ten years ago and the data no longer exists. *See State v. Brown*, 470 N.W.2d 30, 33 (Iowa 1991); *State v. Buller*, 517 N.W.2d at 713. We find no abuse of discretion and affirm on this issue.

II. Sufficiency of the Evidence

Carson challenges the district court's denial of his motion for a directed verdict based on insufficiency of the evidence. Specifically, Carson alleges the State presented insufficient evidence to demonstrate the drug in Carson's urine, alone or in combination with alcohol, caused any degree of intoxication at the time of the accident. The State contends substantial evidence was presented at trial from which the jury was entitled to infer that Carson was in fact operating under the influence of drugs or a combination of drugs and alcohol the night of the accident.

¹ *See also*, Iowa Rule of Evidence 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Our scope of review is on assigned error only. Iowa R. App. P. 4 The standard of review in challenging the sufficiency of the evidence is well established. *State v. Lampman*, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. *State v. Aldape*, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984); *State v. Hall*, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. *Bass*, 349 N.W.2d at 500; *Hall*, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that Carson is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984); *Hall*, 371 N.W.2d at 188.

Carson argues that Mr. Stanley Eck, a criminologist employed by the Iowa Division of Criminal Investigation Criminalistics Laboratory, could not state with any scientific certainty that Carson was under the influence of marijuana. Carson's test

results indicated the presence of 400 nanograms of THC per milliliter, four times higher than what is normally detected by the testing at the state laboratory. According to another expert witness, Dr. Peter John Treeve Stephens, the most that could be concluded from the test results is that Carson used marijuana on a regular basis. Carson stated after the accident that he had not smoked marijuana since April 24, 1994, more than twenty-four hours before the accident. Mr. Eck testified that if Carson did not consume any marijuana after 11:59 a.m. on April 24, 1996, the marijuana would have ceased to have an effect on him. However, Raymond Reynolds, a first responder at the accident, testified he smelled marijuana on one of the passengers; an accident reconstructionist estimated Carson was driving 110 miles per hour before leaving the road; and there was evidence to suggest that Carson was a regular user of marijuana.

Eck also testified that using an average rate of alcohol elimination, Carson may have been impaired at the time of the accident by a blood alcohol content as high as .08. Carson's urine yielded a .025 concentration of alcohol about four hours after the accident. Accordingly, we find substantial evidence supporting the jury's verdict on either of the State's theories including operating under the influence of a combination of drugs and alcohol or recklessness.

III. Jury Instructions

Carson has raised numerous objections to the district court's jury instructions. We will address each asserted error separately.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *State v. Freeman*, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. *W. T. Rawleigh Medical Co. v. Bane*, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord *Borough v. Minneapolis & St. L. R. Co.*, 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see *Miller v. International Harvester Co.*, 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. See *Borough*, 191 Iowa at 1223, 184 N.W. at 323; see also *Miller*, 246 N.W.2d at 301. A corollary to these rules is that the trial court has a duty to ensure that the jury understands the issues it must decide. *Clinton Land Co. v. M/S Assoc., Inc.*, 340 N.W.2d 232, 234 (Iowa 1983); *McDivitt v. Des Moines City Ry.*, 141 Iowa 689, 697-98, 118 N.W. 459, 463 (1909). In fulfilling these duties, the trial court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." *Clinton Land Co.*, 340 N.W.2d at 234. "The sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party urging submission." *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854, 858 (Iowa 1972); *Campbell v. Martin*, 257 Iowa 1247, 1251, 136 N.W.2d 508, 511 (1965).

We recognize the entitlement to a theory of defense instruction for which there is a foundation in the evidence. *State v. Stewart*, 445 N.W.2d 418, 421 (Iowa 1989).

However, we find Carson's proposed negligence instruction is simply another way of instructing the jury to find in his favor if the State failed to prove the necessary element of recklessness. See Iowa Code § 707.6A(1)(b) and 321.277; *State v. Cox*, 500 N.W.2d 23, 25 (1993). The trial court is not required to instruct in the language requested if the topic is covered by the court's own instruction.² *State v. Horn*, 282 N.W.2d 717, 730 (Iowa 1979). We conclude the trial court correctly rejected Carson's proposed negligence instruction and affirm on this issue.

Carson also argues that because the State is granted a presumption of intoxication if Carson's blood alcohol level is .10 or more, the due process and equal protection clauses of the United States Constitution entitle him to an instruction granting a presumption that he was not intoxicated because his blood alcohol level was less than .10. We find no authority supporting an inverse presumption of sobriety. The presumptive .10 level is merely a statement of the legal level of intoxication as determined by the legislature. It does not express an intention on behalf of the legislature to create a presumption of sobriety if a person's blood alcohol level is less than .10. See *State v. Berch*, 522 N.W.2d 741, 745-46 (Iowa

² Jury Instruction 24 states:

Reckless driving is not an intentional wrong in the sense that resulting harm is intended. Rather, a person recklessly drives when they consciously or intentionally drive and they know or should know that by driving they create an unreasonable risk of harm to others.

The offense of reckless driving contains three distinct elements: (1) the conscious and intentional operation of a motor vehicle, (2) in a manner which creates an unreasonable risk of harm to others, (3) where such risk is or should be known to the driver.

1994); Iowa Code § 321J.2(1)(b), 707.6A (1995). *See also State v. Hubka*, 480 N.W.2d 867, 871-72 (Iowa 1992) (state entitled to present evidence of blood alcohol content of .054 in support of “under the influence” alternative for vehicular homicide charge).

Carson additionally argues “willful and wanton conduct” are two essential elements of “recklessness”, an alternative theory of prosecution. *See* Iowa Code § 707.6A(1)(b) and 321.277. Accordingly, the trial court improperly declined to submit Carson’s definition of these two terms. Instead, the trial court submitted Jury Instruction 24³ which Carson claims defines “negligence” rather than recklessness, thus “diluting” the level of culpability required under the statute. The district court’s instruction in is accord with established precedent. The elements of Section 321.277 are recited in *State v. Conyers*, 506 N.W.2d 442 (Iowa 1993):

The offense of reckless driving contains three elements: conscious and intentional operation of a motor vehicle, in a manner which creates an unreasonable risk of harm to others, where such risk is or should be known to the driver.

Id. at 444. We find this instruction included all the necessary elements of reckless driving. Therefore, it was unnecessary for the district court to additionally instruct on “willful and wanton conduct”. We accordingly affirm on this issue.

³ *See* fn. 2.

Carson next objects to Jury Instruction 13⁴ which characterizes statements made by Carson as “admissions”, thus placing undue emphasis on the statements of only one party. He claims the court should have made a specific finding by way of an evidentiary hearing that each statement introduced was in fact an admission under rule 801(d)(2) of the Iowa Rules of Evidence. We decline to impose this requirement on the trial court. The court did not draw attention to any specific statement made by Carson. Thus, the jury was free to give whatever weight, if any, to each individual statement that it deemed appropriate. Nothing in the Iowa Rules of Evidence or in the uniform instructions compels the court to make a determination that each statement referred to by the instruction is in fact an admission. Furthermore, witnesses for the State are not party opponents under rule 801(d)(2). *See* Iowa Uniform Instruction 200.44, cmt. Therefore, there is no need for the instruction to apply to their respective statements as well. The jury was instructed in Jury Instructions 8 and 9 as to which factors to consider in deciding the weight and credibility to lend each witness’ testimony. The district court correctly overruled Carson’s objection to this instruction and we affirm on this issue.

⁴ Jury Instruction 13 states:

Evidence has been offered to show Defendant made statements at an earlier time and place while not under oath. These statements are called admissions.

You may consider an admission for any purpose.

Carson also asserts the district court defined the term “under the influence” too broadly in Jury Instruction 19⁵. There is no merit in this objection. Jury Instruction 19 is modeled after Uniform Iowa Criminal Jury Instruction 2500.5. We are reluctant to disapprove of the use of uniform jury instructions. *State v. Weaver*, 405 N.W.2d. 855, (Iowa 1987); *accord*, *State v. Jeffries*, 313 N.W.2d 508, 509 (Iowa 1981). Given all the testimony that suggested Carson was intoxicated at the time of the accident, including the testimony concerning the speed and manner in which he was driving when the car left the road, Carson’s belligerence, and the statements he made following the accident, we find the trial court’s instruction to be proper in allowing the jury to determine if Carson was operating while “under the influence”.

Carson next argues the trial court erred by submitting an instruction on the use of a drug or the use of a drug in combination with alcohol when there was insufficient evidence to support submitting this issue to the jury. *See generally*, Jury Instructions 19, 20, 21, 22, 25, and/or 26. We have already determined there was sufficient evidence supporting Carson’s conviction. We accordingly also affirm on this issue.

⁵ Jury Instruction 19 states:

A person is “under the influence” when, by drinking liquor and/or beer or by using a drug or by drinking liquor and/or beer and using a drug, one or more of the following is true:

1. His reason or mental ability has been affected.
2. His judgment is impaired.
3. His emotions are visibly excited.
4. He has, to any extent, lost control of bodily actions or motions.

Finally, Carson challenges the validity of Jury Instruction 17⁶ informing the jury they may, but are not required to, conclude that “a person intends the natural consequences of their actions.” Carson contends this instruction, while authorizing a permissive finding, could have lead the jury to find intent upon proof of Carson’s actions alone, thus shifting the burden of proof to Carson to establish he did not have the requisite intent. We disagree. The instruction merely allows the jury, based on the evidence, to find in favor of the State on the issue of general, but not specific, intent. It did not create a presumption against general intent, nor did it suggest that Carson was required to rebut any evidence of general intent. We find no error in this instruction.

IV. Conclusion

We have carefully considered all of Carson’s assignments of errors. We find that none of them warrant either reversal of his convictions or a new trial. The decision of the court below is affirmed.

AFFIRMED.

⁶ Instruction No. 17 states:

To commit a crime a person must intend to do an act which is against the law. It is not necessary that a person knows the act is against the law, but it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident. You may, but are not required to, conclude that a person intends the natural results of his acts.