

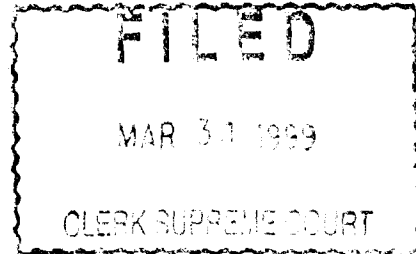
**IN THE COURT OF APPEALS OF IOWA**

No. 9-076 / 97-2257  
Filed March 31, 1999

**STATE OF IOWA,**  
Appellee,

vs.

**JEFFREY DEAN KING,**  
Appellant.



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Appeal from the Iowa District Court for Emmet County, Cameron B. Arnold,  
District Associate Judge.

Jeffrey Dean King appeals his conviction for operating while under the influence of alcohol, second offense, in violation of Iowa Code section 321J.2 (1995), contending his Sixth Amendment right to confront witnesses was violated.

**AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Bill Kelly and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Lynn K. Fillenwarth, County Attorney, and Richard Meyers, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Zimmer, JJ.

**STREIT, P.J.**

Jeffrey King appeals his conviction of operating while intoxicated based on a finding he was operating a vehicle under the influence of alcohol. He contends he was denied his Sixth Amendment right of cross-examination because he was not allowed to question the State's expert witness regarding the standard of per se intoxication set forth in Iowa Code Section 321J.2(1)(b), under which he was not charged. We affirm the trial court.

In August 1996, King was found sitting in the driver's seat of his girlfriend's car. The car had pulled over when a deputy began driving behind it, despite the fact the deputy had not signaled the driver to pull over. Although sitting behind the driver's seat when the deputy approached the car, King denied he was driving. The deputy suspected King was intoxicated and asked King to perform several sobriety tests. He failed several of the field sobriety tests and was given an intoxilyzer test; the result of which was .096.

King was charged with operating while under the influence of alcohol, second offense, in violation of Iowa Code section 321J.2(1)(a)<sup>1</sup> which prohibits operation while "under the influence of an alcoholic beverage."

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<sup>1</sup> 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.

Iowa Code § 321J.2(1)(a) (1997).

At trial, the State offered the expert testimony of a criminalist for the Iowa Department of Criminal Investigation. He testified persons with blood alcohol levels as low as .05 have impaired driving skills. On cross-examination, the defendant sought to question the expert regarding Iowa Code section 321J.2(1)(b), which prohibits persons from operating a vehicle while having a blood alcohol level of .10 or more. The State objected, and the court refused to allow King to question the expert on section 321.2(1)(b) of the Code. The jury convicted the defendant as charged.

Because we find King's appeal is not a constitutional challenge under the test set out in *State v. Veal*, 564 N.W.2d 797, 808,<sup>2</sup> we review for an abuse of discretion. See *State v. Johnson*, 219 N.W.2d 690, 696 (Iowa 1974)(limitation of cross-examination was within exercise of judicial discretion and under circumstances did not rise to the level of a constitutional challenge).

King argues the jury should know the Iowa legislature has established .10 as indicative of intoxication for purposes of our drunk driving statute. King's argument is wholly without merit.

King was charged under Iowa Code section 321J.2(a), not 321J.2(b). Under section (a) the State does not need to show King's blood alcohol level had reached a

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<sup>2</sup> "Restrictions on cross-examination run afoul of the Confrontation Clause of the Sixth Amendment of the United States Constitution if the prohibited questioning would have given a reasonable jury a significantly different impression of the witness' credibility." *State v. Veal*, 564 N.W.2d at 808 (quoting *United States v. Diaz*, 26 F.3d 1533, 1539-40 (11th Cir.1994)).

certain amount, but rather, that he was driving under the influence of alcohol. In Iowa, being “under the influence” means a person has consumed alcohol and displays one or more of the following: (1) a person's reason or mental ability has been affected; (2) a person's judgment is impaired; (3) a person's emotions are visibly excited; or (4) the person has, to any extent, lost control of bodily actions or motions. *In re S.C.S.*, 454 N.W.2d 810, 814 (Iowa 1990).

The fact the Iowa legislature has also passed a statute making a .10 blood alcohol concentration a per se violation of the drunk driving law is not relevant to the determination of whether King was under the influence of alcohol and could be convicted under section 321J.2(a). There is no statutory inference that if a person is below .10 (the legal amount under section 321J.2(b)), they are not influenced by the alcohol. For this reason, the trial court did not abuse its discretion in limiting King's cross-examination.

**AFFIRMED.**