

FILED

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IN THE COURT OF APPEALS OF IOWA SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed October 21, 1980

vs.

)

JEFFREY LYNN SACKETT,

)

0-187

Defendant-Appellant.

)

62074

Appeal from Adair District Court - James E. Hughes, Judge.

Defendant appeals from judgment imposed following his conviction by a jury of driving a motor vehicle while under the influence of alcohol, a violation of section 321.281, The Code 1977, alleging trial court erred 1) in giving certain jury instructions and 2) in overruling his motion for new trial based on newly-discovered evidence. AFFIRMED.

John P. Roehrick of Roehrick & Mohr, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Shirley Steffe, Assistant Attorney General; and Jay E. Howe, Adair County Attorney; for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Jeffrey Sackett, appeals from judgment imposed following his conviction by a jury of driving a motor vehicle while under the influence of alcohol, a violation of section 321.281, The Code 1977. Defendant alleges trial court erred in giving certain jury instructions and in overruling his motion for new trial based on newly-discovered evidence. We affirm.

During the early morning hours of November 19, 1977, officer Bradley Newton of the Greenfield Police Department observed an automobile being driven in a very erratic manner. He noted the car had distinctive taillights ("two squares on top of each other") but could not otherwise describe the car. He followed the car out of Greenfield, at times driving 70-75 miles per hour to keep up with the driver. Officer Newton pursued the car north four miles, then east for two and one-half miles, and south one mile. As he approached an intersection, he saw a car with the same style of taillights going over a hill approximately one-half mile to the east. Although the officer did not see the car he was pursuing turn east, he saw no other cars travelling south or east ahead of him, and saw no dust in any other direction.

The officer turned east and, as he came over the hill, he saw a vehicle parked in the middle of the road. He was unable to brake quickly enough to steer around the car and, consequently, collided with it. Although the officer did not see defendant at the place of impact, he recognized the car as being similar to one driven by defendant earlier that evening in Greenfield. In addition, the car had the same style taillights as the car the officer had followed earlier. Deputy Sheriff Skellinger later came upon the scene, saw defendant lying in the roadway near his car, and detected the odor of alcoholic beverage on his breath.

A trial information was filed against defendant charging him with operating a motor vehicle while under the influence of an alcoholic beverage. After trial, the jury returned a guilty verdict. Before judgment was entered, defendant moved for a new trial based on newly-discovered evidence.

At the hearing on this motion, defendant produced Gladys Hackwell, who lived near the scene of the collision. Referring to the night of the accident, Mrs. Hackwell testified that she saw headlights shining through her bedroom window, heard a noisy car travelling at a high rate of speed past her home, and saw taillights disappearing over a hill to the east; that ten to fifteen seconds later a second set of headlights hit the window; and that upon looking out, she saw a car sitting crosswise in the road.

Defendant argued that this new evidence indicated the officer was chasing a different car and warranted resubmission of the case to the jury. Trial court overruled defendant's motion for new trial. This appeal followed.

1. Error in Instruction. Trial court's Instruction No. 13 stated:

A statute of this State provides that if there is evidence that a person operating a motor vehicle upon a public highway had, at the time of said operation, more than ten one-hundredths of one percentum by weight of alcohol in his or her blood, the same shall be presumptive evidence that such person was then under the influence of an alcoholic beverage.

The rule established by the foregoing statute permits, but does not require, the jury to infer that the defendant was under the influence of an alcoholic beverage if it is found by the jury that at the time defendant was driving an automobile upon the public highway his blood contained more than ten one-hundredths of one percentum by weight of alcohol.

Defendant argues that Instruction No. 13 should not have been given in the above form. He claims the instruction was confusing because it referred to both presumptions and inferences without distinguishing the two concepts, was not supported by substantial evidence, and placed undue emphasis on a portion of the evidence relating to blood alcohol levels. At trial, defendant objected to Instruction No. 13 in the following terms: "In 13, we would object to that first, the first part, that tells the jury that the blood test is presumptive evidence, not merely an inference."

We begin our analysis with Iowa R. Civ. P. 196, made applicable to criminal proceedings by R. Crim. P. 18(7)(f),¹ which provides in pertinent part:

Before jury arguments, all objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal.

Further, "[i]n determining the sufficiency of an attack on an instruction to preserve any alleged error for review in this court the criterion is whether the exception taken alerted the trial court to the error which appellant is now urging." Pose v. Roosevelt Hotel Company, 208 N.W.2d 19, 25 (Iowa 1973). See also Wambasgans v. Price, 274 N.W.2d 362, 365 (Iowa 1979).

¹ This provision was formerly found as Iowa R. Crim. P. 18(5)(f). State v. Rouse, 290 N.W.2d 911, 914 (Iowa 1980).

In this case, defendant's challenge is extremely general, conclusory, and in no way alerted trial court to his specific challenges now raised on appeal. We conclude defendant failed to preserve error on his challenges to Instruction No. 13 now raised and thus will not consider those challenges on this appeal.

Defendant also urges error in trial court's Instruction No. 11 and No. 12. However, defendant made no objections to these instructions at trial. We will not consider objections to instructions raised for the first time on appeal. Rouse, 290 N.W.2d at 914; State v. Galvan, 181 N.W.2d 147, 152 (Iowa 1970). Defendant has preserved no error for our review.

II. Motion for New Trial. Defendant finally argues that trial court erred in failing to grant his motion for new trial based on newly-discovered evidence. The principles governing these motions are well-summarized in State v. Kramer, 231 N.W.2d 874, 881 (Iowa 1975):

Trial court is vested with wide discretion in passing on such motions and its decision will be reversed only if that discretion is abused. Such motions are not favored and should be closely scrutinized and granted sparingly. Defendant must show 1) the evidence was discovered after trial and before judgment, 2) it could not have been discovered earlier in the exercise of due diligence, 3) it is material to the issue, not merely cumulative or impeaching, and 4) it would probably change the result if a new trial is granted.

See generally State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979); State v. Sims, 239 N.W.2d 550, 554 (Iowa 1976). Trial court overruled defendant's motion for failure to satisfy the last three elements set out above. Our conclusion that trial court properly found defendant failed any one of these elements is sufficient to sustain trial court's ruling. State v. Farley, 226 N.W.2d 1, 4 (Iowa 1975).

We concur in trial court's ruling that defendant failed to prove elements two and four of the above test. First, the record supports the conclusion that defendant's counsel became aware of the existence of the evidence before the case was submitted to the jury, but took no action at that time. The law requires defendant to exhaust his probable sources of information concerning his case and to follow all leads which would fairly advise a diligent person that something bearing on the litigation might be discovered or developed. State v. Overstreet, 243 N.W.2d 830, 886 (Iowa 1976). Second, in light of all the evidence, the newly-discovered evidence probably would not change the result if a new trial were granted. We adopt trial court's analysis in this regard:

In perspective of the newly discovered evidence, the facts as shown at the trial clearly establish that the defendant's car was on the public highway; that at the time of the accident the defendant was the only person present; that the tape player was going; one brake light was on, and the car was in "park" gear. The defendant was so connected with the vehicle under the circumstances existing that the jury was entitled to find that the defendant was the operator of the vehicle, and that at the time of the operation of the vehicle, he was under the influence of an alcoholic beverage.

... Finding neither preserved error nor an abuse of discretion, we affirm trial court's judgment.

AFFIRMED.