



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed March 9, 1988

vs.

)

7-396
86-1523

419

MARTIN NICHOLAS HALTERMAN,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Jasper County (No. T-30),
Thomas W. Mott, District Associate Judge.

The defendant appeals his conviction of operating a motor vehicle while
intoxicated. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Raymond E. Rogers,
Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney
General; and James R. Wilson, Assistant Jasper County Attorney, for plaintiff-
appellee.

Heard by Oxberger, C.J. and Donielson and Sackett, JJ.

OXBERGER, C.J.

The defendant Martin Halterman appeals his conviction of operating a motor vehicle while intoxicated. He contends the trial court erred in: (1) permitting the State to amend its trial information during trial to allege he had driven while having an alcohol concentration of thirteen-hundredths or more rather than a blood-alcohol concentration of that amount; and (2) admitting his breath test results where the State allegedly failed to prove the administering officer complied with a Department of Criminal Investigation laboratory memorandum on avoidance of radio frequency interference. We affirm.

At 9:00 p.m. on March 13, 1986, Newton police officer Myrna McFarland observed a car weaving between lanes. She followed the driver to his residence and parked behind him with her red lights flashing. The defendant exited his car with some difficulty. After performing some field sobriety tests the defendant was arrested.

Halterman was given a breath test using an Intoxilyzer Model 4011A. The test showed .182 grams of alcohol per 210 liters of breath. The State brought charges and in the trial information stated Halterman was being charged with operating a motor vehicle while under the influence of alcohol "while having thirteen-hundredths of one percent (.13%) of alcohol by weight in the blood." The minutes of testimony indicated that the State's expert witnesses would testify to blood-alcohol levels.

At trial the State's expert, Michael Rehberg, was cross-examined regarding the relationship between a person's breath-alcohol concentration, as measured by the intoxilizer, and that person's blood-alcohol concentration. After he completed his testimony, the State moved to amend the trial information to state the defendant had "an alcoholic concentration in the blood or breath of 13 hundredths or more." The trial court allowed the amendment because it conformed

to the statutory language in the Iowa Code. The trial court offered the defendant a continuance to prepare if he was surprised by the amendment. The defendant refused this offer.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

Halterman's first assignment of error concerns the trial court's allowance of the State's trial information amendment. He argues the amendment substantially prejudiced him because his defense, relying on the trial information and minutes of testimony, was to attack the blood concentration figures as uncertain because only a breath test was given. He further argues the State elected to prove a blood concentration and not a breath concentration and should not be allowed to change their theory at trial.

Iowa Rule of Criminal Procedure 4(8)(a) allows the State to amend an indictment before or during a trial "to correct errors or omissions in matters of form or substance." Amendment will not be allowed if substantial rights of the defendant are prejudiced, or if a wholly new and different offense is charged. Iowa R. Cr. P. 4(8)(a).¹

The defendant concedes the amendment did not charge a wholly new or different offense. Thus, the question becomes whether defendant's rights were substantially prejudiced. Although we do not approve of the State's dilatory amendment, we do not conclude Halterman's rights were prejudiced by the amendment.

The State amended the information after the State's expert concluded his testimony and prior to the defendant's case-in-chief. Halterman was offered a continuance which he refused to accept. See State v. Schertz, 330 N.W.2d

¹Rule 4(8)(a) is made applicable to trial informations by Iowa R. Cr. P. 5(5).

1, 2 (Iowa 1983). A continuance would have given the defendant an opportunity to develop further evidence necessary for his defense. Furthermore, Halterman had not yet presented his witnesses. See State v. Williams, 328 N.W.2d 504, 506 (Iowa 1983) (indicating that an amendment prior to defense's evidence would not have been error). He could have used his witnesses to attack the State's theories. Halterman could supplant his defense theories in his closing argument. The State's expert could also have been recalled for further cross-examination. Halterman's ability to present a defense was not impaired and he was not prejudiced by the amendment. See State v. Cooper, 223 N.W.2d 177, 180 (Iowa 1974) (reversal required because defendant's right to make a defense impaired by amendment after close of all evidence). But see State v. Zuch, 267 N.W.2d 52, 55 (Iowa 1978) (no error in amending after close of the evidence when defendant given opportunity to present additional evidence). We hold the trial court did not err in granting the State's motion to amend the trial information.

Halterman's second assignment of error relates to the trial court's admitting the results of his breath test. He argues the State failed to meet the foundational requirements. He contends a memorandum issued by the Department of Public Safety (DPS) was not complied with fully.

In September, 1983, the DPS Crime Laboratory Administrator issued a memorandum concerning radio frequency interference and the intoxilizer. He stated in the memo that radio interference was not a problem but suggested that certain cautionary steps be followed to stop questions about the reliability of the test results. When the State attempted to admit the test results, the defendant objected on foundational grounds. He argued all the steps in the September memo had not been followed. He was particularly concerned that the power cord was not coiled to the shortest length possible. The trial court

sustained the objection because it was unclear whether the memo contained instructions or simply suggestions. The State's expert, Rehberg, the memo's author, then testified the memo simply contained suggestions and they were not required for proper testing. The test results would be valid if the operational checklist issued to the police was followed. The trial court then admitted the test results.

We find no error in the admission of the test results. The admissibility of foundational evidence is a matter entrusted to the discretion of the trial court. State v. Mary, 368 N.W.2d 166, 169 (Iowa 1985). To admit the test results the State must show the procedural requirements of Iowa Code Chapter 321B (now chapter 321J) relating to testing procedures were followed. State v. Wolfe, 369 N.W.2d 458, 459 (Iowa App. 1985); see also State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981). A foundational defect will not bar admissibility if the defect did not endanger the accuracy of the test. Schlemme, 301 N.W.2d at 724.

The defendant has failed to show an abuse of discretion. The operational checklist was followed. The State's expert testified the suggestions outlined in the memo were not required for proper testing. The intoxilizer is protected from radio frequency interference. There was no evidence presented to show the test results were in any way endangered by the possible failure of not having the power cord coiled to its shortest length. We hold the trial court did not abuse its discretion in admitting the breath test results.

The defendant's conviction is affirmed.

AFFIRMED.