ELECTRONICALLY FILED NOV 02, 2017 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0476

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN WILLIAM NESS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE TIMOTHY JARMAN, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

GENEVIEVE REINKOESTER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
genevieve.reinkoester@iowa.gov

PATRICK JENNINGS
Woodbury County Attorney

JACKLYN FOX
MARK CAMPBELL
Assistant County Attorneys

ATTORNEYS FOR PLAINTIFF-APPELLEE AMENDED FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW............. 4

ROUTING STATEMENT 5

STATEMENT OF THE CASE 5

ARGUMENT 9

I. THE ADMISSION OF DEFENDANT'S PBT RESULT WAS HARMLESS, AND THERE WAS NO REASONABLE PROBABILITY OF A DIFFERENT RESULT AT TRIAL. 9

A. Legal Test for Ineffective Assistance of Counsel 11

B. Because Defendant Failed to Prove a Reasonable Likelihood of a Different Result at Trial, He has Failed to Show He was Prejudiced..12

C. If the Record is Not Sufficient to Decide Defendant's Claim of Ineffective Assistance of Counsel on Direct Appeal, His Claim Should Be Denied so He May Bring a Post-Conviction Relief Action. 14

D. Alternatively, if Defendant Did Preserve His Evidentiary Claim, Any Admission of the PBT Result was Harmless Error. 14

CONCLUSION 16

REQUEST FOR NONORAL SUBMISSION 16

CERTIFICATE OF COMPLIANCE...17

TABLE OF AUTHORITIES

Federal Case

Strickland v. Washington, 466 U.S. 668 (1984) 11

State Cases

Hutchison v. American Family Mut. Ins. Co.,
514 N.W.2d 882 (Iowa 1994) 12

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012).............................. 11

Ledezma v. State, 626 N.W.2d 134 (Iowa 2001) 12, 13

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)............................... 11

State v. Begey, 672 N.W.2d 747 (Iowa 2003) 12

State v. Dominguez, 482 N.W.2d 390 (Iowa 1992) 13, 14

State v. Keller, 760 N.W.2d 451 (Iowa 2009) 12

State v. Liddell, 672 N.W.2d 805 (Iowa 2003) 12

State v. Newell, 710 N.W.2d 6 (Iowa 2006) 16

State v. Price, 692 N.W.2d 1 (Iowa 2005)... 14

State v. Sullivan, 679 N.W.2d 19 (Iowa 2004) 16

State v. Truesdell, 679 N.W.2d 611 (Iowa 2004) 15

State Codes

Iowa Code § 321J.2(1)(a) 12

Iowa Code § 321J.5 .... 9, 10, 14

State Rule

Iowa R. Evid. 5.103(a) 16

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE ADMISSION OF DEFENDANT'S PBT RESULT WAS HARMLESS, AND THERE WAS NO REASONABLE PROBABILITY OF A DIFFERENT RESULT AT TRIAL.

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)
Hutchison v. American Family Mut. Ins. Co.,
514 N.W.2d 882 (Iowa 1994)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
State v. Begey, 672 N.W.2d 747 (Iowa 2003)
State v. Dominguez, 482 N.W.2d 390 (Iowa 1992)
State v. Keller, 760 N.W.2d 451 (Iowa 2009)
State v. Liddell, 672 N.W.2d 805 (Iowa 2003)
State v. Newell, 710 N.W.2d 6 (Iowa 2006)
State v. Price, 692 N.W.2d 1 (Iowa 2005)
State v. Sullivan, 679 N.W.2d 19 (Iowa 2004)
State v. Truesdell, 679 N.W.2d 611 (Iowa 2004)
Iowa Code § 321J.2(1)(a)
Iowa Code § 321J.5
Iowa R. Evid. 5.103(a)

ROUTING STATEMENT

Because this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Defendant John William Ness ("Defendant") appeals his conviction and sentence following a jury trial in which he was found guilty of one count of Operating While Intoxicated, in violation of Iowa Code section 321J.2. Because Defendant was charged with a third offense, this conviction was a class D felony. On appeal, Defendant argues that the result of a preliminary breath test ("PBT") was erroneously admitted at trial and as a result, he is entitled to a new trial.

Course of Proceedings

The State accepts Defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On July 11, 2016, Defendant drove to a meeting with his probation officer, Nick O'Brien. Trial Tr. 36:5–38:2. O'Brien observed

Defendant's "vehicle pulling into our parking lot and then backing out again and kind of straightening, pulling in again and he got out of his vehicle and started walking towards the entrance of our building[.]" *Id.* at 38:3–39:12. Video surveillance of the building shows Defendant pulling into the parking lot, and straightening his vehicle, before he finally parks his car. Trial Ex. 1.[1]

O'Brien met Defendant at the stairs of the building. Trial Tr. at 39:8–12. During his conversation with Defendant, O'Brien detected "a strong odor of alcohol coming from [Defendant's] person." *Id.* at 39:13–25. Because Defendant was wearing sunglasses, O'Brien could not see his eyes, but he used "a lot of hand motions and kind of ups and downs in the volume of his voice. He was cordial. He wasn't aggressive during the conversation but just some concerning factors." *Id.* at 41:13–20.

Initially, Defendant denied consuming any alcohol. O'Brien told him he smelled "as if he had" been drinking. *Id.* at 43:16–44:4. Eventually, Defendant admitted that "he thought he sobered up enough to drive to the appointment. Said he had been drinking the night before." *Id.* at 45:9–18. O'Brien stated that based on the smell

---

[1] Trial Exhibits 1 and 6 are video recordings and are not included in the appendix.

of alcohol, and Defendant's bloodshot and watery eyes, he did not believe Defendant had sobered up. *Id.* at 45:19–46:2.

O'Brien's supervisor, Karen Borg, also interacted with Defendant while he was at the probation office. Borg noticed "a strong smell of alcohol coming from [Defendant's] person. His speech was slurred when he was talking to us and his eyes were bloodshot." *Id.* at 28:11–18. Defendant was also "going back and forth different conversations that he made the comment that he thought he was sober enough to drive to the appointment and…he thought he was okay to drive. He thought he was sober enough." *Id.* at 28:19–24. It did not appear to Borg that Defendant was sober enough to drive. *Id.* at 28:25–29:25.

Officer Ryan Denney transported Defendant to the county jail. *Id.* at 50:12–51:12. He observed that Defendant "had slurred speech and he smelled strongly of an alcoholic beverage…[and] had watery eyes, bloodshot eyes." *Id.* at 51:22–52:22. Officer Denney also noticed that Defendant "had unsteady balance as he was trying to walk to the car with me and when we went…up into the jail I also noticed that." *Id.* at 53:1–21. It appeared to Officer Denney that Defendant was under the influence of alcohol. *Id.*

Shannon Larson booked Defendant into the Woodbury County Jail. *Id.* at 57:18–58:7. As part of the booking process, Larson asked Defendant if he was intoxicated. *Id.* at 58:8–61:18; Trial Ex. 5; App. 116–17. Defendant told her yes. *Id.* This interaction was recorded, and the recording shows that Defendant answered affirmatively when asked whether he was intoxicated. Trial Ex. 6, around 7:55. Larson also noted on the booking sheet that Defendant appeared to be under the influence of alcohol or drugs, that Defendant indicated he drinks "a lot" of Captain Morgan rum, and the last time he drank was 13 hours ago. Trial Ex. 5, *see also* Trial Ex. 6; App. 116–17. At the bottom of the booking sheet, it states, "I have read the above CAREFULLY and have answered ALL questions correctly to the best of my knowledge." *Id.* Defendant signed under this statement. *Id.*

After the jury found Defendant guilty, he filed a motion for a new trial. The district court denied this motion and stated:

> The Court finds that the jury verdict is not contrary to the weight of the evidence. I've considered all of the evidence in the case. I find that the weight of the evidence supports the verdict of guilty in this case. I believe that to be true even without the evidence of the Alco-Sensor. There's a variety of portions of evidence that support a finding and conclusion that the defendant was under the influence of alcohol at the time he operated

> the motor vehicle. This includes the observations by the State's witnesses and their comments on that, on their observations as well as the statements and actions by the defendant. In particular, the comment by the defendant that was to the effect that he thought that he would have sobered up by now clearly is an admission that the defendant himself believed that he had consumed alcohol to the point of intoxication but apparently had misjudged whether or not he was still intoxicated at the time he went to visit his probation officer. In addition, the defendant's actions and reactions and answers to the questions by the jailor during the booking process I believe all support the jury verdict and finding that the defendant was intoxicated at the time that he had operated the motor vehicle driving to the Department of Corrections office building.

Sent. Tr. 8:6–9:10.

ARGUMENT

I. THE ADMISSION OF DEFENDANT'S PBT RESULT WAS HARMLESS, AND THERE WAS NO REASONABLE PROBABILITY OF A DIFFERENT RESULT AT TRIAL.

Preservation of Error

On appeal, Defendant argues that the result of the PBT administered by probation officer O'Brien should not have been admitted at trial because Iowa Code section 321J.5 precludes the use of these results. Defendant did not make this same argument to the district court. Instead, prior to trial, prosecutors filed a brief that

sought a ruling from the district court that allowed them to introduce the PBT result at trial. 02-08-2017 Brief; App.45–47. Defendant did not file a written resistance.

The district court addressed the prosecutor's brief at the final pretrial conference. Defendant objected to the use of the PBT result for two reasons: 1. Defendant believed the probative value of the evidence did not outweigh its prejudice, and 2. Defendant stated O'Brien was not sufficiently trained to operate a PBT. Pretrial Conf. Tr. 3:1–14, 4:14–7:2. These arguments are not the same arguments Defendant advances on appeal.

During trial, Defendant did not object to the introduction of the PBT result. Trial Tr. 43:16–45:8. Defendant failed to argue to the district court that section 321J.5 precluded the use of the PBT result or to obtain a ruling on such a claim, and he has not preserved this claim for appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)) (holding error is preserved when "the court's ruling indicates that the court considered the issue and necessarily ruled on it....").

Defendant recognizes that this argument may not be preserved for appeal. App. Br. pg. 38–39. However, he asks this Court to

consider his claim under the rubric of ineffective assistance of counsel because such a claim is an exception to the normal error preservation rules. *State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003) (citing *Stallings*, 658 N.W.2d at 108). Appellate review for evidentiary rulings is for an abuse of discretion. *Hutchison v. American Family Mut. Ins. Co.* 514 N.W.2d 882, 885 (Iowa 1994).

Merits

A. Legal Test for Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove either element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001)

(internal string citation omitted). Here, Defendant's claim can be decided on the prejudice prong alone.

B. Because Defendant Failed to Prove a Reasonable Likelihood of a Different Result at Trial, He has Failed to Show He was Prejudiced.

Defendant was charged under Iowa Code section 321J.2(1)(a) under the theory that he was operating a motor vehicle "[w]hile under the influence of an alcoholic beverage or other drug or a combination of such substances." Iowa Code § 321J.2(1)(a). This charge has two elements: 1) Defendant must have operated a motor vehicle; and 2) Defendant must have done so while under the influence of alcohol or another drug. *Id.*; *see also* Jury Instr. No. 11; App. 54. Defendant does not contest that he operated a motor vehicle. The only question for the jury was whether Defendant was under the influence of alcohol at the time.

A person is "under the influence" when at least one of the following is true because of alcohol consumption: 1) the person's reasoning or mental ability is affected; 2) the person's judgment is impaired; 3) the person's emotions are visibly excited; or 4) the person, to any extent, loses control of bodily actions or motions. *State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992), *see also* Jury Instr.

No. 13; App. 55. Conduct and demeanor are important considerations in evaluating whether a person is under the influence. *State v. Price*, 692 N.W.2d 1, 3 (Iowa 2005). A person's manner of driving also pertains to whether he or she is under the influence. *Dominguez*, 482 N.W.2d at 392. Any one of these factors on its own can suffice to support an inference that a person is under the influence. *Id.*

Here, all four factors strongly support the inference that Defendant was under the influence. The witnesses testified that Defendant smelled strongly of alcohol, had bloodshot, watery eyes, slurred his speech, continuously changed the volume of his voice while talking, and was unsteady on his feet. In addition, Defendant twice admitted to consuming alcohol. First, he stated to probation officer O'Brien that he had been drinking the night before, but believed he was sober enough to drive. Second, while being booked into the county jail, Defendant acknowledged he was intoxicated and signed the booking sheet, affirming he was intoxicated. This was overwhelming evidence that Defendant was intoxicated, and the jury was free to interpret this evidence as proof that Defendant was under the influence when he drove to his probation appointment.

C. If the Record is Not Sufficient to Decide Defendant's Claim of Ineffective Assistance of Counsel on Direct Appeal, His Claim Should Be Denied so He May Bring a Post-Conviction Relief Action.

While Defendant's trial counsel did not object to the introduction of the PBT result under Iowa Code section 321J.5, he did object to the introduction of this result based on its prejudicial nature and based on whether the test had been administered properly. If the Court believes it is possible that trial counsel made a deliberate, strategic choice regarding the objections he did make regarding the PBT result, Defendant's claim should be denied to allow trial counsel the opportunity to testify in a post-conviction relief action regarding his strategic trial choices. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) (internal citation omitted) (finding ineffective assistance of counsel claim would be "best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim.").

D. Alternatively, if Defendant Did Preserve His Evidentiary Claim, Any Admission of the PBT Result was Harmless Error.

If the Court finds Defendant preserved his current argument—which the State strenuously denies—his claim still fails because the

district court's decision to admit the result of his PBT amounts to harmless error. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected…." Iowa R. Evid. 5.103(a). Thus, Rule 5.103(a) requires a harmless error analysis when nonconstitutional error is alleged. *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006). "[T]he test for determining whether the evidence was prejudicial and therefore required reversal [is] this: 'Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?'" *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (internal citation omitted). Prejudice is presumed unless the contrary is affirmatively established. *Id.* Based on the level of proof presented at trial—as outlined above—any error was non-prejudicial, and this Court should affirm. *See Newell*, 710 N.W.2d at 19–20 ("This court has held…that no prejudice will be found where the evidence in support of the defendant's guilt is overwhelming."). Based on a totality of the record, Defendant did not suffer a miscarriage of justice as a result of this evidentiary ruling.

CONCLUSION

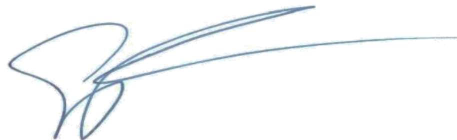
For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence and deny all claims on the merits.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



GENEVIEVE REINKOESTER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
genevieve.reinkoester@iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,317** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: November 2, 2017

GENEVIEVE REINKOESTER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
genevieve.reinkoester@iowa.gov