IN THE SUPREME COURT OF IOWA

No. 17–0476

Filed February 9, 2018

Amended April 24, 2018

STATE OF IOWA,

Appellee,

vs.

JOHN WILLIAM NESS,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Timothy Jarman, District Associate Judge.

The defendant appeals his conviction for operating while intoxicated third offense, contending the district court erred in admitting the results of a breath test administered by his probation officer. **REVERSED AND REMANDED.**

Zachary S. Hindman of Mayne, Arneson, Hindman, Hisey, & Daane, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Genevieve Reinkoester, Assistant Attorney General, Patrick Jennings, County Attorney, and Jacklyn Fox and Mark Campbell, Assistant County Attorneys, for appellee.

MANSFIELD, Justice.

This appeal requires us to decide whether a conceded error in the admission of evidence was harmless.

An individual on probation drove himself to the probation office. When he arrived, his probation officer detected the strong smell of an alcoholic beverage. This would have been a violation of the terms of his probation, so the officer gave him a breath test with a device that law enforcement use to perform preliminary breath tests (PBT). The test showed a blood alcohol level of .130. The individual was arrested, booked into jail, and charged with operating while intoxicated (OWI) third offense.

In the subsequent trial, the district court admitted this test result over the defendant's objection. The jury found the defendant guilty. The defendant now appeals, arguing that admission of the test result was an error in light of language from Iowa Code section 321J.5(2) which reads, "The results of this preliminary screening test . . . shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter." Iowa Code § 321J.5(2) (2016).

For purposes of this appeal, the State does not dispute that the test results should not have been admitted. However, it argues the defendant failed to preserve error below or, alternatively, any error was harmless.

We conclude the defendant did preserve error, and the error was not harmless. This is not one of the relatively rare OWI cases where admission of a test showing a blood alcohol level in excess of the legal limit could be considered harmless. We therefore reverse the district court's judgment and remand for a new trial.

I. Facts and Procedural History.

On July 11, 2016, at about 1:15 p.m., John Ness drove to a meeting with his probation officer, Nick O'Brien. O'Brien noticed that Ness had to

back out and straighten his car before reparking it. Ness kept his footing as he walked toward the building to meet O'Brien, although he did gesticulate quite a bit upon meeting O'Brien in the parking lot.

During their encounter, which continued inside the building, O'Brien detected the strong odor of an alcoholic beverage. The terms of Ness's probation forbid his consumption of alcohol. When questioned, Ness initially denied consuming alcohol. O'Brien obtained an Alco-Sensor III device, which is often used as a preliminary breath screening device by law enforcement. He asked Ness to breathe into the device. It returned a reading of .130, well above the legal limit of .08.

At this point, Ness admitted he had been drinking the night before but said he thought he had "sobered up enough to drive to the appointment." Ness's eyes appeared bloodshot and watery. O'Brien's supervisor Karen Borg entered the meeting, and she too noticed a strong smell of alcoholic beverage, bloodshot eyes, and slurred speech. The Sioux City police were contacted.

Upon his arrival, Sioux City Police Officer Ryan Denney placed Ness under arrest and transported him to the jail. He likewise noticed the strong odor of an alcoholic beverage, bloodshot and watery eyes, and slurred speech. In addition, Ness appeared to Denney unsteady as he walked. Like O'Brien and Borg, Denney felt that Ness was under the influence of alcohol.

At the jail, Ness was asked a series of standard booking questions. Among other things, Ness was asked whether he was intoxicated. He answered "yep." The affirmative answer was recorded on the booking video and also memorialized in the questionnaire answers that Ness later signed, representing that he had "read the above CAREFULLY and ha[d] answered ALL questions correctly to the best of [his] knowledge."

On July 27, the State charged Ness by trial information with OWI third offense, a class "D" felony. *See* Iowa Code § 321J.2(2)(*c*). Before trial, on February 14, 2017, the State filed a motion in limine seeking a pretrial ruling that the Alco-Sensor results were admissible since the test was administered not under an implied-consent procedure, but in the course of supervising Ness's probation. The State argued,

> Implied consent law is not the exclusive means by which the State may obtain chemical test evidence from a Defendant in an Operating While Intoxicated proceeding. *See* Iowa Code Section 321J.18 ("This chapter does not limit the introduction of any competent evidence bearing on the question of whether a person was under the influence of an alcoholic beverage . . . ."). In this case, the officer did not invoke the implied consent procedures, and consequently, we do not judge the admissibility of any chemical test under the standards applicable to the implied consent standards. *State v. Demaray*, 704 N.W.2d 60, 64, 2005 WL 2319238 (Iowa 2005). Instead, the chemical test was obtained through probationary procedures.

Ness did not file a written response before the pretrial hearing, which took place the next day. At the hearing, Ness's attorney argued the test results should not come into evidence "as . . . a reason for the OWI." He insisted that the case did involve implied consent because a screening test was "the basis for this charge."

The district court ruled in the State's favor. It concluded,

> When used as a "preliminary breath test" (PBT) under the implied consent law, the results of the PBT cannot normally be introduced into evidence at a trial.
>
> However, the implied consent law (Section 321J.6) was not implicated in this case. The Alco-Sensor was not used for the purpose of a preliminary breath screening test. Instead, it was used by a probation officer to confirm his belief that the defendant was intoxicated when he appeared for a probation appointment.

The case went to a jury trial on February 28. At the conclusion of the evidence, the jury was instructed that a guilty verdict required a

finding that Ness was operating his vehicle "[w]hile under the influence of an alcoholic beverage"; the jury was not instructed on the "[w]hile having an alcohol concentration of .08 or more" alternative. *See* Iowa Code § 321J.2(1)(*a*), (*b*). The jury returned a guilty verdict. Ness was committed to the custody of the director of the department of corrections for a term not to exceed five years for assignment into the OWI continuum. *See id.* § 321J.2(5)(*a*)(1). Ness was also fined, and his driver's license was ordered revoked for six years.

Ness timely appealed, and we retained his appeal.

II. Standard of Review.

Our analysis of the district court's decision to admit the result of the Alco-Sensor breath test depends on statutory interpretation. "Our review is therefore for correction of errors at law." *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003). However, we will not overturn a conviction for an error in the receipt of evidence if the error was harmless. *See State v. Moorehead*, 699 N.W.2d 667, 672–73 (Iowa 2005).

III. Analysis.

Ness argues that the Alco-Sensor test results should not have been admitted at trial. He notes that Iowa Code section 321J.5 provides,

> 1. When a peace officer has reasonable grounds to believe that either of the following have occurred, the peace officer may request that the operator provide a sample of the operator's breath for a preliminary screening test using a device approved by the commissioner of public safety for that purpose:
>
> *a.* A motor vehicle operator may be violating or has violated section 321J.2 or 321J.2A.
>
> *b.* The operator has been involved in a motor vehicle collision resulting in injury or death.
>
> 2. *The results of this preliminary screening test* may be used for the purpose of deciding whether an arrest should be

> made or whether to request a chemical test authorized in this chapter, but *shall not be used in any court action* except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Iowa Code § 321J.5 (emphasis added). In Ness's view, the phrase "any court action" encompasses the trial we are reviewing, and thus his .130 test result should not have been admitted.

In the proceedings below, the State argued—and the district court found—that the evidentiary prohibition in Iowa Code section 321J.5(2) did not apply to the Alco-Sensor device per se but only to the device when it is being used to perform a preliminary breath test within the meaning of the implied-consent law. *See id.* § 321J.6. In other words, any evidentiary bar was test-based rather than device-based.

Ness counters that such a distinction is not contemplated by the statute and would not be workable because it would require examination of the subjective intent of the person utilizing the device and would open up a large loophole in the implied-consent law. Ness also cites us to *Harmon v. State*, where the Maryland Court of Special Appeals relied on similar language in Maryland's implied-consent law (i.e., "may not be used as evidence by the State in any court action") to reject a similar prosecution argument. 809 A.2d 696, 705 (Md. Ct. Spec. App. 2002) (quoting Md. Code Ann., Transp. § 16–205.2).

We need not resolve this dispute over the meaning of Iowa Code section 321J.5(2) today because the State concedes for appeal purposes that the .130 test result should not have been admitted. Instead, the State insists Ness failed to preserve error because he did not argue below that the statute precluded admission of the test. Alternatively, the State contends that admission of the test result was harmless error.

We can dispense with the State's first argument quickly. The *State* filed a motion in limine below seeking a pretrial ruling that the implied-consent law did not bar admission of the test results. The hearing on the motion took place the next day. Ness's attorney orally resisted the motion, although the grounds for his resistance could have been presented more clearly. Still, there is no question that the proper interpretation of the statute was an issue before the court. At the hearing, the State elaborated that "[i]n this particular case the Alco-Sensor was used independent of the implied consent law" and therefore the evidentiary bar "does not apply here." Ness's counsel responded that "what we have is this individual using this test to then form a basis for the OWI charge." And the district court ruled on this statutory argument, stating, "[T]he implied consent law (Section 321J.6) was not implicated in this case. The Alco-Sensor was not used for the purpose of a preliminary breath screening test." Accordingly, Ness is not raising a new issue on appeal, and there would be no unfairness to the State or the district court if we consider the alleged statutory violation. *See State v. Ambrose*, 861 N.W.2d 550, 555 (Iowa 2015) (noting that "principles of error preservation are based on fairness" (quoting *State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003))).

We therefore turn to the question of harmless error.

> Where a nonconstitutional error [is] claimed, the test for determining whether the evidence [is] prejudicial and therefore require[s] 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) (quoting *State v. Trudo*, 253 N.W.2d 101, 107 (Iowa 1977)). "We presume prejudice unless the record affirmatively establishes otherwise." *Moorehead*, 699 N.W.2d at

673. "A breath test result is important evidence in prosecutions for drunk driving." *Id.*

In *State v. Garrity*, we held the trial court erred in admitting the defendant's refusal to take a breath test where the defendant had not been accorded his rights under Iowa Code section 804.20. 765 N.W.2d 592, 597 (Iowa 2009). Yet we found the error harmless. *Id.* at 597–98. Quoting the standard above, we emphasized that in this bench trial

> [t]he judge who entered the verdict in this case specifically stated that she observed the recording taken at the police station and determined that Garrity was intoxicated based upon his body motions, judgment, slurred speech, and inability to communicate. There is no indication that she took into consideration the content of Garrity's statements on the recording, and the test refusal was not a factor in her decision.

Id. at 598.

By contrast, in *Moorehead*, we determined it was not harmless error to admit a breath test result of .182 that should have been suppressed due to a violation of Iowa Code section 804.20. 699 N.W.2d at 672–73. It was true that

> Moorehead was speeding, did not immediately stop for the deputy, swerved over the center line twice, had an odor of alcohol, slurred speech, and glazed eyes, failed all field sobriety tests, and admitted he was "drunk as hell" at the station.

Id. at 672. Still, *Moorehead* had been tried to the court, and in the court's verdict, "Moorehead's high breath test result [was] the very first fact cited as evidence of guilt." *Id.* at 673.

The present case was tried to a jury, so we don't have any windows into the fact finder's reasoning, but the State argues it doesn't matter because the evidence of Ness's guilt was "overwhelming." This includes several witnesses' testimony that Ness gave off a strong smell of an alcoholic beverage, had bloodshot and watery eyes, was unsteady on his

feet, and slurred his speech; Ness's admission at the probation office that he had been drinking; and Ness's admissions at the jail that he was presently intoxicated.

We agree the proof that Ness was under the influence was strong even without the test result. But we cannot say it was so strong as to overcome the presumption of prejudice. *See Moorehead*, 699 N.W.2d at 673. In addition to testimony from the probation officer and the police, two videos were admitted into evidence and viewed by the jury. One depicted Ness's actions before he entered the probation office, and the other (with sound) covered the time period when Ness was booked into the jail. Ness's appearance on the videos, in our judgment, is inconclusive. From the videos, one might conclude that Ness—although somewhat hyperactive—was in control of his faculties.

As Ness points out, there is something special about objective tests like the Alco-Sensor. Ness characterizes that test as "the type of precise evidence that a jury will seize in order to avoid the messy business of weighing the imprecision of mere observations." *See State v. Gieser*, 248 P.3d 300, 303 (Mont. 2011) (noting that a breath test has "an appearance of precision and scientific reliability that is qualitatively different from the more subjective observations of the officer as to speech, eyes, coordination and odors"). And the prosecutor referred to the .130 test result three times during her brief closing argument. *See State v. Duncan*, 27 S.W.3d 486, 489–90 (Mo. Ct. App. 2000) (determining the state's emphasis on the test and "the fact that the jury may have relied on the test in whole or in part to convict" meant error was not harmless); *Commonwealth v. Marshall*, 824 A.2d 323, 329–30 (Pa. Super. Ct. 2003) (noting the repeated references to a PBT throughout the trial "may have entered jury deliberations" and concluding "significant doubt exist[ed] that the jury" did not consider

"such evidence in entering its guilty verdict"). We conclude that the admission of the test result injuriously affected Ness's rights. *See State v. Lukins*, 846 N.W.2d 902, 912 (Iowa 2014) (reversing where the district court "may have relied on the erroneously admitted test results" in finding the defendant guilty).

For the foregoing reasons, we decline to find harmless error and reverse and remand for a new trial without the Alco-Sensor test result.

REVERSED AND REMANDED.