

IN THE COURT OF APPEALS OF IOWA

No. 0-431 / 09-1491
Filed July 28, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN PIERRE BRASWELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell McGee (suppression) and D.J. Stoval (trial), Judges.

Defendant appeals his conviction for operating while intoxicated.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Matthew T. Lindholm of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger and Peter J. Grady, Assistant Attorneys General, and John P. Sarcone, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J. takes no part.

EISENHAUER, J.

John Braswell appeals his conviction of operating while intoxicated (OWI). Braswell argues: (1) the court's restriction of defense counsel's closing argument violated his constitutional rights; and (2) the court erred in denying his motion to suppress the breath test result. Braswell contends he was arrested at 2:44 a.m. at a Kum & Go store. The State argues Braswell was not arrested until *after* he arrived at the police station for processing. We conclude Braswell was arrested at 2:44 a.m., and the breath test result should have been suppressed. We remand for a new trial. We affirm the court's ruling preventing defense counsel from misstating the law during closing argument.¹

I. Background Facts and Proceedings.

In the early morning hours of February 28, 2009, Iowa State Patrol Trooper Christensen was dispatched to assist a stranded motorist in his patrol area. Although West Des Moines was not in his patrol area, Trooper Christensen knew it had a twenty-four hour Kum & Go store where the motorist could buy antifreeze. While Trooper Christensen and the motorist were inside the store, the night manager reported the following to Trooper Christensen:

[T]here's a black car in the parking lot, the one with the lights on and the engine running, that [the manager] had checked on the individuals earlier and felt that they had been passed out in there, and [the manager] was going to address the situation with the West Des Moines police officer earlier in the evening, but they had to leave on a call.

¹ Our resolution makes the additional issues Braswell raises moot and we do not address them.

Trooper Christensen approached Braswell's car and found two people "either asleep or unconscious or passed out in the front of the vehicle." Braswell was in the driver's seat with the lights on and the engine running. Trooper Christensen knocked on the window to try to rouse Braswell, who "woke up" for a minute but then "slumped back over." Trooper Christensen knocked a second time and Braswell "kind of came to and he poked at the window to get it to come down. He had difficulty doing that." When the window opened, Trooper Christensen noticed "an extremely strong smell of an alcoholic beverage."

Trooper Christensen asked for Braswell's driver's license. Braswell first offered his Polk County sheriff's badge and then he offered a credit card. After another request for a driver's license, Braswell handed over his license. Braswell also had trouble finding his car registration and proof of insurance, but eventually gave them to Trooper Christensen. Trooper Christensen noticed Braswell seemed confused and had bloodshot, watery eyes and slurred speech.

At 2:36 a.m., Trooper Christensen took Braswell's information to his patrol car and called dispatch² for another trooper to assist him "with another violation": "My intention was to turn over the OWI case to Trooper Salesberry and for me to continue to help [the motorist]." At 2:37 a.m., Trooper Christensen told the motorist: "It looks like we got us a Polk County sheriff."

² Trooper Christensen's patrol car camera was not recording the correct time, but it processed time sequences accurately. The parties agree dispatch is called at 2:36 a.m. This correlates to 3:23 a.m. on Trooper Christensen's patrol car camera, for a forty-seven minute interval. On State's Exhibit 1, a forty-seven minute interval is listed for time of arrival at police station: state radio log "0256" and patrol car camera "0343." When using times from Christensen's patrol car camera, we have adjusted for a forty-seven minute interval.

From 2:38-:39 a.m., Trooper Christensen returned to the Braswell vehicle and questioned Braswell:

Q. Oh, John Braswell, how much have you had to drink tonight? A. That's why I'm here. I'm parked.

Q. But your car was running so that's a problem. How much have you had to drink tonight? A. Enough not to drink—or drive.

Q. What? You're not making sense. How much have you had to drink tonight? A. Enough not to drive.

Q. Enough not to drive? A. Yeah.

Q. All right. Do you have a gun in the car? A. No.

Q. All right. All right. Well, I got a guy in there with me now who I got to deal with. So you're going to need to stand by for a few minutes. A. What? But I ain't driving.

Q. Well, we haven't got that far yet. I still got to deal with you. Where do you work? You work the street or the jail or what? A. Civil division.

Q. Civil division. All right. Why don't you come inside the Kum & Go and talk to me? That way you won't get cold. I won't get cold, and we can talk to you in there. A. All right.

Inside the Kum & Go, at 2:42 a.m., Braswell tells Trooper Christensen his girlfriend was not driving because he is “stubborn.” Also at 2:42 a.m., Trooper Christensen leaves the store to talk to Trooper Salesberry and tells him:

[Christensen] I got this guy here. He's broke down, county line. I got a drunk deputy sheriff in this car here. He's inside. He's extremely intoxicated. He needs dealt with. He's a Polk County deputy.

[Salesberry] Okay. I'll take care of it.

[Christensen] I'm out of my element—

[Salesberry] Oh, that's fine.

[Christensen] Because we're up here. This is his information. I would just as soon you process him. I've got his supervisor's phone number. He's got a girlfriend in the car who he says is sober enough to drive. I think she's okay.

When I arrive, this man here says I need to check on them. They thought they were passed out. I went out, engine's running, lights are on. He is passed out. Opened the window. Strong odor of an alcoholic beverage, slurred speech, bloodshot watery eyes.

Both troopers enter the store and at 2:43 a.m., Trooper Christensen addresses Braswell:

Q. Mr. Braswell, come here. Here's what's going to happen. I'm from a post down south. A. Okay.

Q. This is the post one trooper. He works Polk County. When I walked up to your car, your engine was running. Your lights were on. The manager was concerned about this. So I checked on you. You rolled the window down, and I told you right away (inaudible). Your eyes were bloodshot and watery, speech was slurred.

So I called him in to deal with you. That's where we are. All right? A. Okay.

At 2:44 a.m., Trooper Salesberry and Braswell exit the Kum and Go and head the same direction from which Trooper Salseberry approached the store when he arrived. At a pretrial hearing, Trooper Christensen testified Trooper Salesberry took Braswell to Trooper Salesberry's patrol vehicle at this time at Christensen's request.³ Trooper Christensen remains in the store to obtain the store employee's name and the store address.

Trooper Salesberry returns to the store without Braswell and at 2:48 a.m., the following discussion occurs inside the store:

(inaudible)

[Trooper Christensen] All right. Well, then follow me to wherever you need to go, and I'll process him.

[Trooper Salesberry] Okay.

[Trooper Christensen] It's an OWI. It's an indictable offense.

[Trooper Salesberry] I understand.

[Trooper Christensen] All right. Well, have you done field sobriety?

[Trooper Salesberry] I mainly talked to her and talked to him.

[Trooper Christensen] All right. Where do we go to process them here?

[Trooper Salesberry] Polk County—either Polk County Jail or you could take him to West Des Moines PD if you wanted to.

³ At numerous points in the record, Trooper Christensen testifies Trooper Salesberry took Braswell from the store to Trooper Salesberry's car.

[Trooper Christensen] (Inaudible) We probably go to West Des Moines.

[Trooper Salesberry] That's fine.

[Trooper Christensen] All right. Well, I'm going to have him do field sobriety tests in here—

[Trooper Salesberry] Okay.

[Trooper Christensen]—unless they do them in West Des Moines.

[Trooper Salesberry] I think they got a space there. They've always told me I could bring them in if I want to. I just haven't had a chance to.

[Trooper Christensen] All right. I'm out of my element. I don't even know where West Des Moines PD is.

[Trooper Salesberry] I can show you.

[Trooper Christensen] Okay. All right.

The troopers leave the store at 2:49 a.m., and split up. Trooper Christensen returns to his car and tells the stranded motorist: "This is turning into a mess. I apologize for this. . . . Well, this trooper doesn't want to deal with it." At 2:50 a.m., Trooper Christensen leaves his car and walks to Braswell's car to talk to Braswell's girlfriend. There is no indication Braswell is in the car at this time:

Q. All right. I'm going to release the car to you. He's drunk. So I'm going to take him to West Des Moines for processing. I got no choice. He's *really* intoxicated. His speech is slurred and everything. A. (Inaudible).

. . . .
Q. Yeah. Unfortunately, you left the car running with the lights on. A. (Inaudible).

. . . .
Q. All right. There you go. (Inaudible). A. Where you going? West Des Moines?

Q. Yep. A. Will he be there all night (inaudible)?

Q. Depends on what their policy is. I'm from down south.

A. I'm just wondering when he'll get home.

Q. I would imagine they won't release him till he's sober

At 2:52 a.m., Trooper Christensen tells Trooper Salesberry he will follow him to the West Des Moines police station, tells Braswell's girlfriend she can

leave, and gets back in his patrol car. Trooper Salesberry drives Braswell to the station while Trooper Christensen drives the motorist. While Trooper Christensen processes Braswell, Trooper Salesberry takes over assistance to the motorist.

At the police station Trooper Christensen takes Braswell to the adult booking section and invokes implied consent. Braswell submits to a breath test which indicates his blood alcohol concentration was .137. Subsequently, the court denied Braswell's pretrial motion to suppress the breath test results. After a jury trial, Braswell was convicted of OWI and this appeal followed.

II. Motion to Suppress.

Braswell argues his breath test results should have been suppressed under Iowa Code section 321J.6(2) (2009), because he was not offered the breath test within two hours after his arrest and the offer was made under a false threat of license revocation. Because Braswell bases his objection to admission of the test results on statutory grounds, we review the trial court's ruling to determine whether it was based on an erroneous interpretation of the statute. *State v. Kjos*, 524 N.W.2d 195, 196-97 (1994).

A. Operating While Intoxicated Statutes.

Section 321J.6(1) provides:

A person who operates a motor vehicle in this state under circumstances which give reasonable grounds to believe that the person has been operating [while intoxicated] is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of specimens The withdrawal of the body substances and the test or tests shall be administered at the written request of a peace officer

Section 321J.6(2) provides:

The peace officer shall determine which of three substances, breath, blood, or urine, shall be tested. Refusal to submit to a chemical test of urine or breath is deemed a refusal to submit and section 321.J9 applies [driver's license revocation for refusal]. . . . If the peace officer fails to offer a test within two hours after the preliminary screening test is administered or refused or the arrest is made, whichever occurs first, a test is not required, and there shall be no revocation under section 321J.9.

Section 321J.18 provides:

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 . . . including the results of chemical tests of . . . breath . . . obtained more than two hours after the person was operating a motor vehicle.

B. Case Law.

In *State v. Kelly*, 430 N.W.2d 427, 429 (Iowa 1988), the section 321J.6(2) two-hour time limit commenced at 3:54 p.m., when Kelly “was placed under arrest.” At 5:10 p.m., the trooper made an oral request for an intoxilyzer breath test. *Id.* at 428. Kelly responded by requesting to speak with counsel. After talking to her attorney, Kelly “acceded at 6:03 p.m. to a written request for a breath test” and the test was administered at 6:10 p.m. *Id.*

The district court suppressed the test results “finding adherence to the two-hour limit to be a statutory foundational requirement for the admission of evidence of section 321J.6 tests.” *Id.* at 429. The Iowa Supreme Court disagreed:

[I]t is not disputed the two-hour limit was not satisfied here. The written request was not made to Kelly until two hours and nine minutes after her arrest. The oral request at 5:10 p.m. was not sufficient, under our cases, to comply with the statute. See *State v. Richards*, 229 N.W.2d 229, 233 (Iowa 1975) (the written request is

one of the foundational requirements for admissibility . . .). We must now determine whether the two-hour limit is a foundational requirement for the admission of evidence of section 321J.6 tests in a prosecution for [OWI]. . . .

. . . [We] note the general purpose of chapter 321J and the specific purposes of the procedural requirements contained therein. Chapter 321J is designed “to reduce the holocaust on our highways . . . due to the [OWI] driver. The purpose of its procedural requirements is “to protect the health of the person submitting to a test and to guarantee its accuracy for use in later judicial proceedings.” . . .

We can conceive of no circumstances under which the failure to make the written request within the two-hour limit would endanger the defendant’s health. Nor are we persuaded the accuracy of the test would be endangered to the defendant’s prejudice by such a delay. . . . [T]ime in excess of two hours in administration of the test would . . . result in a decrease, not an increase, in the defendant’s blood alcohol concentration.

. . . .

We think it is clear . . . the legislature intended the two-hour limitation established by section 321J.6(2) to apply only to a driver’s license revocation under section 321J.9. We hold that that the two-hour requirement under section 321J.6(2) is not a foundational requirement for the admissibility of evidence in an [OWI] prosecution.

Id. at 429-31 (citations omitted). The *Kelly* majority ruled Kelly’s claim her consent to the breath test was not voluntary was not before the court. *Id.* at 431.

The *Kelly* dissent “fail[ed] to see how a test administered under the compulsion of the implied consent procedure may somehow be determined to be a voluntary submission to a test.” *Id.*

If we follow the reasoning of the majority opinion, we have an anomalous result. We would allow the admission of evidence obtained by deceit. The defendant was informed orally and in writing that a failure to submit to the test would result in the loss of her driver’s license. This is not true. We should not reward this deception by admitting the fraudulently obtained evidence. Rather, the exclusionary rule should apply, making the evidence inadmissible.

. . . Obviously the consent to the test was not voluntary. It was compelled by the implied consent procedures with its false

threat of a license revocation. The real issue before the court has been preserved. Should we allow the admission of evidence secured by deceit? I think not.

Id. (citations omitted).

The *Kelly* case was discussed in *Reed v. Iowa Dept. of Transp.*, 478 N.W.2d 844, 848 (Iowa 1991):

In *Kelly*, we made it clear that section 321J.6(2) does not prohibit testing after the two-hour time limit has expired. The statute merely provides that a test is not required after the two hours. And a *refusal* to consent to a test at that time does not result in revocation. In addition, if the defendant does consent to testing and the other provisions of section 321J.6 are met, the test results are admissible in the criminal prosecution.

....

The two-hour time limit in section 321J.6(2) applies only to a test refusal revocation under section 321J.9 [refused test and officer had reasonable grounds to believe person OWI] and not to a test result revocation under section 321J.12 [submits to chemical testing and results in excess of prohibited levels].

Finally, we consider *State v. Kjos*, 524 N.W.2d 195, 196 (Iowa 1994).

Kjos was arrested at 4:30 a.m. for OWI. “More than two hours later Kjos was asked to give a breath test. He was erroneously told that a failure to consent to the breath test would cause him to lose his driver’s license.” *Id.* Kjos consented to testing and the test revealed an alcohol concentration of .131. *Id.* Kjos argued the test results were inadmissible because the officer requesting the test told him he would lose his license if he did not agree to the test. *Id.* The court agreed:

Here Kjos was requested to submit to a breath test more than two hours after his arrest. He was falsely told that his failure to take the test would result in the revocation of his driving privileges. On the basis of this information, he consented to the test.

....

We held in *Kelly* that a failure to request a chemical test within two hours after arrest does not render the results of the test

inadmissible under 321J. However, we did not decide in *Kelly* whether the results of a test offered more than two hours after the arrest *and* given under the threat of license revocation should be excluded at trial. That is a different issue.

....
Section 321J.6(2) provides that a person offered a chemical test more than two hours after his arrest can refuse the test without risk of license revocation. Consequently, the police officer who arrested Kjos was precluded from telling Kjos that his license would be automatically revoked if he did not consent to the test. We think the remedy for this statutory violation should be exclusion of the test results. Only in this way can a defendant's right to refuse a test offered more than two hours after arrest be preserved.

Our decision here in no way undermines our decision in *Kelly*. Under *Kelly*, the results of a chemical test are not inadmissible simply because the test is offered more than two hours after the defendant's arrest. However, if the test is offered more than two hours after the defendant's arrest *and* the defendant's consent is obtained by the false threat of license revocation, then the test results must be excluded.

Id. at 196-97 (citations omitted).

C. Merits.

In ruling on the motion to suppress, the trial court did not determine when Braswell was arrested. Rather, relying on *Reed*, the court ruled the statutory two-hour time limit does not apply in cases where the defendant submits to a test.

On appeal, Braswell and the State agree the trial court's ruling is an erroneous interpretation of the statute. Under *Kjos*: Where "the test is offered more than two hours after the defendant's arrest *and* the defendant's consent is obtained by the false threat of license revocation, then the test results must be excluded." *Id.* at 197. Braswell argues he was arrested when he was taken to Trooper Salsberry's car at 2:44 a.m. The State argues Braswell was not arrested

until either he “refused to submit to field sobriety tests” or at his 3:02 a.m. refusal to submit to a preliminary breath test (PBT).

We consider whether Trooper Christensen offered Braswell the chemical test within two hours of the time Braswell was (1) arrested or (2) refused to submit to a preliminary test, whichever occurred first.

Arrest is defined in Iowa Code section 804.5: “Arrest is the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person’s submission to custody.” “There is no bright-line rule or test.” *State v Dennison*, 571 N.W.2d 492, 495 (Iowa 1997). Rather, “the question of whether a defendant was ‘arrested’ is determined on a case-by-case basis.” *Id.*

Prior cases are also helpful to further sculpt the definition of “arrest.” It has been held that mere submission to authority is not sufficient to constitute an arrest. However, “an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest.” The court looks to whether the officers had a “purpose to arrest” or whether a reasonable person would have believed otherwise.

Additionally, although the use of formal words of arrest are not required to effectuate an arrest, it is a factor to consider. . . .

Furthermore, the lack of booking or filing of charges does not necessarily nullify an arrest. Whether the individual was handcuffed also has been considered by the court in determining whether an arrest has occurred.

Id. at 494-95 (citations omitted).

After consideration of the above factors, we conclude Trooper Christensen “asserted his authority” and “had a purpose to arrest” Braswell when he turned Braswell over to Trooper Salesberry for processing. This was “followed by submission” by Braswell and a reasonable person would not have believed

otherwise. The facts detailed above and the following facts support our conclusion.

When Braswell was finally awakened after two attempts, he had trouble opening the window and, once opened, there was “an extremely strong smell of an alcoholic beverage.” Trooper Christensen stated:

As I continued to have contact with him, I noticed he had the inability to follow simple instructions of producing the required documentation, plus he seemed confused in understanding, you know, that I wanted a driver’s license, not a credit card, that I wanted a driver’s license, not a badge. He exhibited bloodshot, watery dilated eyes and he also slurred that I noticed.

Trooper Christensen took Braswell’s license and registration and did not return them at the scene. When Trooper Christensen called dispatch at 2:36 a.m. for assistance “with another violation,” he was certain Braswell was intoxicated and Braswell was not free to leave.

When Trooper Salesberry arrived, Trooper Christensen asked him to process Braswell for an OWI and told Braswell Trooper Salesberry would “deal with him.” At 2:44 a.m., Trooper Salesberry took over the processing of Braswell. Trooper Christensen testified Trooper Salesberry “took Mr. Braswell and put him in his car” and later returned without Braswell and indicated he was not going to process him. During Trooper Christensen’s deposition, he testified for all practical purposes when Braswell was with Trooper Salesberry he was under arrest. At the suppression hearing, Trooper Christensen changed his testimony about when an arrest occurred, but did not change his testimony about whether he would have used handcuffs while transporting Braswell to the police station:

Q. That's your testimony here today too, correct? A. No, I've since learned he wasn't under arrest.

Q. That's because you specifically didn't tell him that he was under arrest, correct? A. That's the criterion that I'm following, is that case, yes.

....

Q. No, I'm asking do you know when an arrest takes place?
A. Yes.

Q. So those factors constituting an arrest, those were all present but for the fact that you didn't tell him he was under arrest, correct? A. Yes.

Q. You also testified at the deposition that had you transported Mr. Braswell he certainly would have been handcuffed, correct? A. Yes.

Q. That's your testimony here today as well, correct? A. Yes.

When Trooper Christensen released Braswell's car to the sober girlfriend, he stated: "He's drunk. So I'm going to take him to West Des Moines for processing. I got no choice. He's *really* intoxicated. His speech is slurred and everything."

At 2:56 a.m., Trooper Christensen arrived at the WDM station to process Braswell. Officer Becker of the West Des Moines Police Department was on duty and came into contact with Braswell because "Trooper Christensen had arrested him out at Kum and Go and brought him into our booking facility or holding facility." Additionally, it was Officer Becker's impression "Braswell was under arrest when he was brought into the West Des Moines Police Department."

At trial, Trooper Christensen testified Braswell's arrest occurred at 3:00 after arrival at the police station when he made a determination to pursue the investigation. Trooper Christensen explained an additional factor in determining the time of arrest was Braswell's entry into the bathroom upon arrival at the

police station despite being told he should not go in there because a urine test might be requested:

Q. What more information did you have that Mr. Braswell was intoxicated between the scene when he was placed in Trooper Salesberry's car and when you determined him to be under arrest?

A. I considered the totality of the circumstances. His behavior in the bathroom weighed heavy upon my decision.

Q. Anything else? A. No.

At 3:01 a.m., Trooper Christensen asked Braswell to do four field sobriety tests. Braswell agreed he had administered these tests to others and replied: "I don't want to do the field sobriety tests." Next Braswell asked to call an attorney and was provided with a phone and phone book.

At 3:10 a.m., Trooper Christensen asked Braswell if Trooper Salesberry had read him his Miranda rights. When Braswell responded negatively, Trooper Christensen gave Braswell his Miranda rights. Braswell continued to make phone calls. At 3:35 a.m., Trooper Christensen returned to his car and stated:

STATE PATROLMAN (on cell phone): Hi, there. Sorry to bother you. This is 268. Just so you know, I've arrested a Polk County deputy for OWI.

The totality of the circumstances reveal Braswell was arrested at 2:44 a.m., when Trooper Christensen turned Braswell over to Trooper Salesberry for processing for OWI. The fact Trooper Christensen did not specifically tell Braswell he was under arrest at that time is not dispositive. At *no point* in the evening did Trooper Christensen specifically tell Braswell he was under arrest and Braswell was not free to leave from the scene.⁴ See *State v. Delockroy*, 559

⁴ We attach no importance to Trooper Salesberry leading Braswell out of the store. Trooper Christensen testified Trooper Salesberry "felt he had a conflict of interest being

N.W.2d 43, 45-46 (Iowa Ct. App. 1996) (stating “an arrest can occur without the police specifically informing the arrestee of their intention to arrest” when “there was no indication [defendant] had any choice but to go to the sheriff’s office”). We find more persuasive the fact Trooper Christensen would have utilized handcuffs during transport as indicative Trooper Christensen asserted his authority and had a “purpose to arrest.” See *id.* at 47 (stating “if there is no purpose by police to arrest a person under the circumstances [warranted search, drugs in house, defendant transported in handcuffs to police station], justice would be served by specifically informing the person no arrest is being made and there is no obligation to accompany police to the station”).⁵

Because Braswell was not offered the chemical test within two hours of his 2:44 a.m. arrest, or by 4:44 a.m.,⁶ his license was not subject to revocation. Trooper Christensen obtained Braswell’s consent for chemical testing by the false threat of license revocation. Under *Kjos*, the trial court erred in admitting

a trooper that works the midnight shift up here and the defendant being a Polk County deputy, so he didn’t want to process him.” Trooper Christensen demonstrated an assertion of authority and had a purpose to arrest at 2:44 a.m. The fact Trooper Salesberry was not “on the same page,” does not change our objective conclusion.

⁵ In our view, nothing changed during the time of involuntary transportation to the police station to make the fact of arrival at the police station the starting point of the arrest.

⁶ The record contains two exhibits of the form: “Request and Notice Under Iowa Code Chapter 321J.” State’s Exhibit 5 is handwritten with 4:45 a.m. filled in for “Time of Request.” It also states Braswell signed by computer and does not contain Braswell’s signature. State Exhibit’s 4 is a computer printout with 4:50 a.m. printed in the blank for “Time of Request.” Braswell’s signature is on this exhibit. At trial, Trooper Christensen testified he read implied consent at 4:50 a.m.

Further, State’s Exhibit 1 is a chart giving times for the evening’s events. The chart indicates “By 268 [Trooper Christensen] 7-5-09.” Three of the times and sources listed for implied consent are: 0447—state radio log; 0447 0448—WDM booking video; 0450—my watch. We need not determine the exact time of written implied consent because no exhibit states a time at or before 4:44 a.m.

the results of Braswell's breath test. We remand for a new trial without the use of Braswell's breath test result.

We recognize Trooper Christensen was making a concerted attempt to make a written offer for a chemical test within the two-hour time period. However, our result is mandated by *Kjos* and by section 321J.6(2) using an arrest as one trigger for a two-hour limitation even though the "time of arrest" has "no bright-line rule or test" and is determined on a "case by case" basis. *Dennison*, 571 N.W.2d at 495.

III. Limits on Closing Argument.

Braswell argues the trial court's restriction of the scope of his counsel's closing argument "is a clear violation of [his] constitutional guarantee to the 'assistance of counsel' embodied in the Sixth and Fourteenth Amendments." The State replies the proposed closing argument "would have been a misstatement of the law" and was correctly prohibited. Because we are remanding for a new trial, we address this issue.

Initially, we must consider the scope of review. Braswell contends we review his constitutional claim de novo. See *State v. Massengale*, 745 N.W.2d 499, 500 (Iowa 2008). The State agrees constitutional claims are reviewed de novo, but notes we review the district court's interpretation of Iowa Code section 321J.2 (2009) for errors at law. See *State v. Garrity*, 765 N.W.2d 592, 595 (Iowa 2009). Further, the scope of closing argument rests within the sound discretion of the trial court. See *State v. Melk*, 543 N.W.2d 297, 301 (Iowa Ct. App. 1995).

We need not resolve the scope of review issue, however, because we conclude Braswell's claim fails even if we utilize a de novo standard of review.

The jury was instructed the State must prove two elements for the crime of operating a motor vehicle under the influence of alcohol: (1) defendant operated a motor vehicle; and (2) at the time defendant was operating the vehicle, he was either under the influence of alcohol or had an alcohol concentration of .08 or more. The jury was further instructed: "The term 'operate' means to be in the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running." See Iowa Code § 321J.2 (2009).

Prior to trial, the State filed a motion in limine seeking to prevent Braswell's counsel "from any argument or questioning of witnesses or jury members which would tend to invite jury nullification on the issue of operation."

At the hearing on the State's motion, Braswell's counsel argued:

[W]hat I anticipate . . . is arguing to the jury that Mr. Braswell's position of being in the car asleep, behind the driver's seat even with the engine running, the fact that he was not touching any controls, was slumped over in a deep sleep, that . . . does not meet the definition of immediate, actual physical control and, therefore, does not meet the definition of operation; thus the State has failed to meet their burden to show that Mr. Braswell was operating.

The State responded:

In the cases that the jury instructions rely on and the cases that define operation for 321J . . . the person was behind the wheel in the car, in the seat, with his body in a position to control everything. . . . [T]he person was either asleep or passed out behind the wheel of a motor vehicle that had its engine on and the Court found that is operation by definition in Iowa.

The court granted the State's motion and stated counsel "may argue the facts which existed at the time, but any suggestion that those facts do not rise to the level of operation will be limited."

On appeal, Braswell agrees counsel may not "intentionally misstate the law or argue the jury should feel free to disregard the law" during the closing argument. See *Richardson v. Bowersox*, 188 F.3d 973, 979-80 (8th Cir. 1999). Braswell contends, however, the resolution of his issue depends on whether "defense counsel's closing argument that a particular set of facts do not meet the definition of" operating "constitutes a misstatement of the law if an appellate court has previously determined similar facts were sufficient to sustain a conviction for the same offense." Braswell argues the trial court "failed to grasp the distinction between the law for purposes of a jury trial, and an appellate court decision finding that there was sufficient evidence to support a conviction on appeal." See *State v. Anspach*, 627 N.W.2d 277, 231 (Iowa 2001).

We conclude Braswell's interpretation of the Iowa cases discussing "operating" is too limited. Prior decisions consider and refine the definition of "operating" as a question of law.

First, in *State v. Weaver*, 405 N.W.2d 852, 853 (Iowa 1987), Weaver was found asleep at the wheel of his truck in the middle of the roadway with the truck's engine and lights on. Weaver argued his truck was inoperable due to a problem with the transmission. *Weaver*, 405 N.W.2d at 853. The court found his "assignment of error to be without merit, *legally* or *factually*." *Id.* at 854 (emphasis added). The court stated both statutory language and prior decisions

show “there need not be vehicle movement nor capability of vehicle movement for a person to be in actual physical control, and therefore operating, a motor vehicle” *Id.*

In *State v. Webb*, 202 Iowa 633, 637, 210 N.W. 751, 752 (1926), we reasoned that “[t]he real danger that this statute seeks to protect against [is the] possible results from a drunken condition of a driver”, and held that a defendant stopped by police just after starting the ignition but before proceeding down the road, was operating his vehicle because turning the key was “the initial step in carrying out the operation of the car.”

Id.

Next, in *State v. Hines*, 478 N.W.2d 888, 889-90 (Iowa Ct. App. 1991), we ruled Hines was operating a vehicle when he was found in a parking lot slumped over the steering wheel of his car with the engine running. Hines argued “the mere act of turning on the ignition does not amount to “operating” the vehicle. *Hines*, 478 N.W.2d at 889. We considered prior case law and ruled: “Hines was ‘operating’ his vehicle when he started the car’s engine, thereby exerting control over the vehicle.” *Id.* at 889. This language indicates we considered the definition of operating as a question of law.

Finally, in *State v. Murray*, 539 N.W.2d 368, 369-70 (Iowa 1995), the Iowa Supreme Court held Murray was operating his vehicle when he was found on the road’s shoulder, slumped over the steering wheel with the engine running, but with the vehicle incapable of movement due to a malfunctioning clutch. The court recognized: “To the extent that this case presents an issue of statutory interpretation our review is to correct errors of law. *Murray*, 539 N.W.2d at 369.

We first identify the scope of our analysis. It is not controlling that there was no evidence showing Murray drove while he was

intoxicated. A person may “operate” a motor vehicle without “driving” it. *State v. Weaver*, 405 N.W.2d 852, 854 (Iowa 1987). Instead we focus on whether the word ‘operating’ encompasses an intoxicated person sleeping behind the wheel of a disabled car which has its engine running.

Id. Again, the court’s language indicates it was deciding a legal point and refining the definition of operating rather than just determining the sufficiency of the evidence.

Accordingly, Braswell’s counsel’s proposed closing argument is a misstatement of the law and was properly limited by the district court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Sackett, C.J., concurs; Mansfield, J., dissents.

MANSFIELD, J. (dissenting)

I respectfully dissent. The critical question is whether Braswell's arrest preceded the State's request for the chemical test by more than two hours. I agree with my colleagues that the request came between 4:47 and 4:50 a.m. However, I cannot agree that the defendant Braswell was under arrest at 2:44 a.m. on February 28, 2009, when he possibly entered Trooper Salesberry's car. As discussed below, I think it is unclear whether Braswell even entered Salesberry's car prior to 2:54 a.m., when he was transported in the front of Salesberry's car to the West Des Moines police station. The DVD does not show where Salesberry and Braswell went at 2:44 a.m., just that Braswell was trailing Salesberry on foot outside the Kum & Go. However, regardless of how this factual point is resolved, Braswell was not arrested at 2:44 a.m. My colleagues have erroneously transformed a non-custodial encounter into a full-blown arrest.

Iowa State Police Trooper Christensen was assigned to Post Two, which covers various counties south of Polk County and north of the Missouri border. Early on the wintry morning of February 28, he was dispatched to assist a stranded motorist along I-35 several miles south of the Polk County line. The motorist was on crutches and had only one leg, and his car needed antifreeze. Christensen decided to drive him to the nearest Kum & Go, located in West Des Moines at I-35 and Mills Civic Parkway. Christensen planned to drive this motorist back to his car after he purchased antifreeze.

Upon arriving at the Kum & Go, Christensen was informed by the night manager that two people (a male and a female) were passed out in a black

Mercedes in the parking lot with the engine running and the lights on. Shortly before 2:35 a.m., Christensen approached the car. After repeated knocking, he woke the driver, later identified as John Braswell. Christensen noticed Braswell had an extremely strong odor of an alcoholic beverage, as well as bloodshot and watery eyes. He asked for identification. Seemingly confused, Braswell produced first a credit card and then his deputy sheriff's badge. Eventually, Braswell was able to provide his driver's license and registration. At 2:36 a.m. Christensen asked Braswell to "stand by" and went back to his patrol car. Christensen then radioed for assistance, explaining that he was already dealing with a "1046" (a driver's request for assistance) and needed help on "another violation."

While waiting for the other officer to arrive, Christensen returned to Braswell's car. Christensen asked Braswell how much he had had to drink. Braswell answered, "Enough not to drive."⁷ The dialogue then continued:

CHRISTENSEN: All right. Do you have a gun in the car?

BRASWELL: No.

CHRISTENSEN: All right. All right. Well, I got a guy in there with me now [the stranded motorist] who I got to deal with. So you're going to need to stand by for a few minutes.

BRASWELL: What? But I ain't driving.

CHRISTENSEN: Well, we haven't got that far yet. I still got to deal with you. Where do you work? You work the street or the jail or what?

BRASWELL: Civil division.

CHRISTENSEN: Civil division. All right. Why don't you come inside the Kum & Go and talk to me? That way you won't get cold. I won't get cold, and we can talk to you in there.

BRASWELL: All right.

⁷ Braswell later admitted having had six gin and tonics.

Thus, at 2:40 a.m. Braswell and Christensen entered the Kum & Go. Christensen walked in first, allowing Braswell to follow him by a few paces.

Additional conversation occurred inside the Kum & Go. When Christensen asked Braswell why he had not had his female companion drive, Braswell answered he was “stubborn.”

At 2:43 a.m. State Trooper Salesberry, who works for Troop One based in Polk County, arrived at the Kum & Go parking lot. A dispatcher, Robert Johannesen, was also riding in Salesberry’s car. Christensen noticed the car’s arrival and asked Braswell to “just hang out.” Christensen then left the store to go outside and speak with Salesberry. Christensen explained the situation to Salesberry and asked Salesberry to “process” Braswell. Salesberry said he would “take care of it” and that Christensen could go. Christensen responded, “I kind of want to see what’s going to happen here.”

Thus, at 2:44 a.m. Christensen and Salesberry walked into the Kum & Go together. Christensen explained to Braswell:

CHRISTENSEN: Mr. Braswell, come here. Here’s what’s going to happen. I’m from a post down south.

BRASWELL: Okay.

CHRISTENSEN: This is a post one trooper. He works Polk County.

When I walked up to your car, your engine was running. Your lights were on. The manager was concerned about this. So I checked on you. You rolled the window down, and I told you right away [inaudible]. Your eyes were bloodshot and watery, speech was slurred.

So I called him in to deal with you. That’s where we are. All right?

BRASWELL: Okay.

At that point, Salesberry can be seen on the DVD walking out of the Kum & Go toward his vehicle. Braswell can be seen *following* Salesberry about ten feet behind.

For the next three or four minutes, Christensen interviewed the Kum & Go night manager inside the store while Salesberry and Braswell talked separately. Since the microphone was on Christensen, not Salesberry, there is no recording of what Salesberry and Braswell discussed. Also, because the camera inside Christensen's car was aimed at the Kum & Go, it is not clear where Salesberry and Braswell spoke. My colleagues assume it was in Salesberry's car, but the record does not confirm this.

It is true, as my colleagues point out, that Christensen testified "yes" when asked by Braswell's attorney to confirm that "Trooper Salesberry took Mr. Braswell and put him in his car." However, from the DVD, it is apparent that Christensen stayed inside the Kum & Go and likely would not have known *where* Salesberry and Braswell went to talk. Notably, Dispatcher Christensen, Salesberry's passenger, testified that he observed Braswell on two occasions—first, when he saw Braswell inside the Kum & Go, and, second, "[i]n the vehicle when we were doing the transport, when he got in, I could immediately smell an odor of an alcoholic beverage." This indicates Braswell did not get into Salesberry's car until he was being taken to the West Des Moines police station, approximately ten minutes later.

At 2:48 a.m. Salesberry walked back into the Kum & Go, leaving Braswell (wherever he was) behind. Salesberry approached Christensen, and the two

troopers had a private conversation, only the last part of which is audible on the recording.

At the suppression hearing, both Salesberry and Christensen testified that Salesberry told Christensen in the inaudible portion of the conversation he was not going to process Braswell because of a personal “conflict.” Thereafter, on the audible portion of the recording, Christensen can be heard saying that he would take over the processing. He stated to Salesberry, “It’s an OWI. It’s an indictable offense.” Salesberry said he understood. Christensen also asked Salesberry if he had done field sobriety on Braswell, and Salesberry indicated he had not, responding, “I mainly talked to her [Braswell’s companion] and talked to him [Braswell].”⁸ Christensen said he would perform field sobriety in the Kum & Go, unless he could do it at the West Des Moines Police Department. Salesberry indicated “they got a space there” and agreed to lead the way to the police department, about a mile or a mile and a half away. According to his later trial testimony, Salesberry loaded Braswell into his patrol car at that point.⁹ Johannesen recalled that Braswell rode up front with Salesberry to the police station while Johannesen himself rode in the back seat.

At 2:54 a.m. the two cars headed toward the West Des Moines police station. Christensen still had the stranded motorist in his car, which followed

⁸ Salesberry’s statement that he talked to *both* Braswell *and* his female companion also might support an inference that the conversation occurred some place other than Salesberry’s car.

⁹ As Salesberry testified, “Q. How did you get to the West Des Moines PD? A. I loaded the defendant into my vehicle because I knew how to get there and the other trooper followed me there.” Again, this suggests that Braswell had not previously been in Salesberry’s car because he needed to be “loaded.”

Salesberry's. At 2:56 a.m., the cars arrived at the police station. The stranded motorist was transferred to Salesberry's car. Christensen went into the police station with Braswell. Braswell started walking from the lobby area into the bathroom, and Christensen followed him saying, "You can't go in there. I may want urine as a test from you." Braswell kept going until Christensen grabbed his arm and pushed him back into the lobby. One of the West Des Moines police officers time-stamped a punch card saying that Christensen and Braswell had arrived at 2:58 a.m.

At 3:02 a.m. Braswell refused to perform the preliminary field sobriety tests, and at 3:10 a.m. he was given his *Miranda* rights. He was never specifically told he was arrested. During his time in the police station, Braswell repeatedly asked officers for "professional courtesy" and to "help me out," but his requests were denied. He also asked to place, and did place, various phone calls. Christensen later testified that Braswell appeared to be "stalling," an impression that is confirmed by the transcript of the police station recording.

It is not disputed that Christensen read the implied consent form to Braswell at 4:47/4:48 a.m. and that Braswell received it no later than 4:50 a.m. Christensen allowed Braswell to defer making a decision on chemical testing until his attorney arrived in the police station. After privately consulting his attorney, Christensen consented to the chemical test, and the test result of .137 occurred at 5:32 a.m.

The fighting issue in this case is whether the chemical test was offered to Braswell within two hours of his arrest. See Iowa Code § 321J.6(2) ("If the peace

officer fails to offer a test within two hours after the preliminary screening test is administered or refused or the arrest is made, whichever occurs first, a test is not required, and there shall be no revocation under section 321J.9.”). I believe it was. Our legislature has defined “arrest” as “the taking of a person into custody when and in the manner authorized by law, including restraint of the person or that person’s submission to custody.” Iowa Code § 804.5. At the very earliest, Braswell could not have been considered “arrested” until Trooper Salesberry “loaded” him into the front of his patrol car and took him to the police station at 2:54 a.m. The request for the chemical test came no later than 4:50 a.m., which was within two hours.

To have a valid argument for suppression of the breath test results, Braswell must establish he was under arrest at 2:44 a.m. when he followed Trooper Salesberry on foot out of the Kum & Go and (according to my colleagues) to his patrol car. This argument cannot be sustained. At that point the OWI was still in an investigatory stage. No field tests had been performed. Braswell was not under restraint of any kind. He is seen on the video walking out of the store well behind Salesberry. No one had used the word “arrest”; Christensen told Braswell in Salesberry’s presence that Salesberry was simply going to “deal with you.” The record does not reflect exactly what Salesberry and Braswell discussed, or where they talked, but at the conclusion of their conversation Salesberry left Braswell behind, reentered the Kum & Go, and told Christensen he did not want to process the case because of a “conflict.” In sum, as of 2:44 a.m., we have only an investigation in progress, not an arrest.

My colleagues, I believe mistakenly, rely on three points to conclude Braswell was under arrest as of 2:44 a.m. First, they assert he was not “free to leave.” Second, they assert Christensen had already concluded Braswell was intoxicated at that point and intended to arrest him. Third, they focus on Christensen’s change of testimony regarding his understanding of the legal definition of arrest.

Turning to the first point, *any* person who has been subjected to a traffic stop is not free to leave. Nevertheless, we have long drawn a clear demarcation between a traffic stop and an arrest. What happened here, at least until Braswell was taken to the police station, was just a traffic stop. Braswell was asked politely to “stand by,” “hang out,” etc. for a brief period of about fifteen minutes while a preliminary OWI investigation proceeded, delayed partly by Christensen’s need to deal with another matter and partly by Salesberry’s reluctance to get involved in a matter involving another law enforcement officer. The majority’s reliance on *State v. Dennison*, 571 N.W.2d 492 (Iowa 1997), is puzzling to me, because *Dennison* indicates that “an individual’s detention by an officer for the purposes of performing field sobriety tests does not rise to the level of custody, but is merely detention for investigative purposes.” *Dennison*, 571 N.W.2d at 495. As in *Dennison*, we have here only “detention for investigative purposes.” I do not believe the majority opinion in this case squares with *Dennison*.

Nor is it relevant that by 2:44 a.m. Trooper Christensen may have already reached a subjective conclusion that Braswell had been operating his vehicle

while intoxicated and would need to be taken into custody. The test of whether a person has been arrested is an objective one.

To determine if a suspect is in custody we look to whether the suspect was formally arrested or whether the suspect's freedom of movement was restricted to such a degree to be associated with a formal arrest A custody determination depends on objective circumstances, not the subjective belief of the officers or the defendant.

State v. Brogan, 774 N.W.2d 676, 680 (Iowa 2009); *see also State v. Miranda*, 672 N.W.2d 753, 759 (Iowa 2003); *State v. Countryman*, 572 N.W.2d 553, 558 (Iowa 1997). What Christensen believed or expected to happen as he was dealing with Braswell is beside the point.

For the same reasons, I put little stock in Christensen's affirmative response to a long, leading deposition question that "for all practical purposes when Mr. Braswell was with Trooper Salesberry he was basically under arrest." Again, what matters is not what Christensen may have believed, but what the objective circumstances were. The DVD shows clearly a non-arrest situation. Moreover, Christensen retracted this deposition answer at the suppression hearing, explaining quite simply, "I have since learned that legally he wasn't under arrest."

If subjective beliefs matter, my colleagues fail to explain why we should focus only on Christensen's subjective beliefs as opposed to those of Salesberry, who supposedly took Braswell into custody at 2:44 a.m. Yet Salesberry testified as follows:

Q. Did you see him [Christensen] do anything that from your point of view would indicate to you that the Defendant was under arrest? A. No.

Q. Did you place the Defendant under arrest? A. No, I did not.

.....

Q. Did you do anything that would give you grounds to believe that he was under arrest? A. I did nothing to arrest him, no.

I agree with my colleagues that the limits on closing argument were appropriate.

The remaining appellate issues raised by Braswell and not discussed in the majority opinion are insubstantial. I would affirm.