IN THE COURT OF APPEALS OF IOWA

No. 0-668 / 09-1549
Filed November 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ANTHONY MALLORY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

The defendant appeals his judgment and sentence for operating a motor vehicle while intoxicated, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, David Porter, Assistant County Attorney, and Holly Stott, Student Legal Intern, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

Mark Mallory appeals his judgment and sentence for operating a motor vehicle while intoxicated (OWI), third offense. He challenges (1) the admission of hearsay statements and (2) his trial attorney's failure to object to the record made on his stipulation to two prior OWI convictions.

I. Background Facts and Proceedings

A vehicle struck a tree near downtown Des Moines. Officer Jacob Hedlund arrived at the scene and observed only one person in the vehicle—Mark Mallory. The lower half of Mallory's body was in the driver's seat, and the upper half of his body was sprawled across the front passenger seat.

Hedlund smelled alcohol. He asked Mallory if anyone else had been in the vehicle. Mallory said no. Hedlund later told Officer Colin Boone, who came to assist, that Mallory said he had been drinking and driving when the car crashed.

Mallory was taken to the hospital, where his urine sample revealed an alcohol concentration of .184, well over the .08 legal limit. Mallory was arrested and charged with OWI, third offense, and driving while revoked.

At trial, Mallory stipulated to the results of the urine test but denied he was driving the car at the time of the accident. Over Mallory's objection, Officer Boone recounted Mallory's admission to Officer Hedlund that he had been drinking and driving. Boone's testimony was as follows: "Officer Hedlund stated that he asked the defendant if he was the driver. He said he was. He asked if he had been drinking, and he said he had been." The jury found Mallory guilty of OWI and driving while revoked.

Outside the presence of the jury, Mallory stipulated to two prior OWI convictions but gave ambiguous responses to questions about his legal representation at the prior proceedings. The district court accepted Mallory's stipulation as knowing and voluntary and later imposed sentence. Mallory appealed.

II. Admission of Hearsay

Mallory contends the district court erred in allowing Officer Boone to recount the admission Mallory made to Officer Hedlund. *See State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003) (reviewing hearsay ruling for errors of law). While he concedes his statement to Hedlund was admissible as an admission by a party opponent, *see* Iowa R. Evid. 5.801(*d*)(2)(A), he argues the repetition of that statement by Boone was hearsay.

The State responds that Boone's testimony was admitted for two non-hearsay reasons: (1) "the investigation had to eliminate the search for other injured individuals from a public caretaking perspective"; and (2) "the statement illustrates why the investigation turned to the defendant as an O.W.I. suspect."

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). To determine whether evidence was offered for the truth of the matter asserted, we must make an objective finding, based on the facts and circumstances found in the record, of the real purpose for which the evidence was offered. *State v. Deases*, 518 N.W.2d 784, 792 (Iowa 1994); *State v. Sowder*, 394 N.W.2d 368, 371 (Iowa 1986).

The "real purpose" is clear. Hedlund testified that Mallory was the only one in the vehicle. Hedlund did not say Mallory was the driver. Boone's testimony connected the dots, leaving no room for speculation on this key question. The statement was offered for the truth of the matter asserted, and it was hearsay.

Our conclusion is bolstered by Hedlund's testimony. The State called him to the stand before Boone. Hedlund said he did not observe anyone else in the area when he arrived at the scene, aside from the witness who reported the accident. In light of this testimony, the State did not need to introduce Boone's challenged statements "to eliminate the search for other injured individuals."

Hedlund also said he smelled a strong odor of alcohol coming from the vehicle. Hedlund's suspicion that Mallory had been drinking was confirmed by the urine test result to which Mallory stipulated. In light of this evidence, the State did not need Boone's challenged statements to explain "why the investigation turned to the defendant as an O.W.I. suspect." *See State v. Doughty*, 359 N.W.2d 439, 442 (Iowa 1984) (stating the scope of responsive-conduct evidence must be carefully limited and should not go "beyond the point of merely explaining why certain responsive actions were taken by the officers").

As Boone's challenged statements were hearsay and the State does not argue that any of the hearsay exceptions apply, his statements were inadmissible.

Our inquiry does not end here, because the erroneous admission of hearsay evidence amounts to reversible error only if it was prejudicial. *See* Iowa R. Evid. 5.103(*a*) ("Error may not be predicated upon a ruling which admits or

excludes evidence unless a substantial right of the party is affected. . . ."). Where substantially the same evidence is in the record, erroneously admitted evidence will not be considered prejudicial. *Sowder*, 394 N.W.2d at 372; *see also State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("[W]e will not find prejudice if the admitted hearsay is merely cumulative.").

In addition to Hedlund's statement that Mallory was the only person in the vehicle, the jury heard from a witness who arrived at the scene moments after the crash to find only Mallory inside the vehicle. The jury also heard Boone testify that Mallory's legs were trapped under the steering column. Hedlund similarly testified that the lower half of Mallory's body "was in the driver's seat and his upper body was in between the driver's seat and passenger front seat." This circumstantial evidence was substantially similar to Boone's challenged statements. While it did not fully connect the dots in the same way that Boone's statements did, the jury is presumed to have followed its instruction to "make deductions and reach conclusions according to reason and common sense." Reason and common sense would dictate that if Mallory was the only person in or around the vehicle moments after the crash, he must have been the driver. We conclude the erroneous admission of Boone's hearsay statements does not amount to reversible error.

III. Prior OWI Convictions

Mallory next claims his trial attorney was ineffective in failing to challenge the record made on his stipulation to the prior convictions. Iowa Rule of Criminal Procedure 2.19(9) sets forth the procedure for establishing prior convictions. The rule provides in relevant part:

> After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel.

Iowa R. Crim. P. 2.19(9); *see also State v. Kukowski*, 704 N.W.2d 687, 692 (Iowa 2005) (stating the rule gives defendant opportunity to affirm or deny (1) the existence of the prior convictions and (2) representation by counsel when previously convicted or knowing waiver of counsel).

The record is inadequate to determine whether Mallory was represented by counsel in the prior OWI proceedings or whether he waived counsel. For that reason, we preserve this matter for postconviction relief proceedings. *State v. Oberhart*, ___ N.W.2d ___, ___ (Iowa 2010); *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

We affirm Mallory's judgment and sentence for OWI, third offense, and preserve his ineffective-assistance-of-counsel claim for postconviction relief proceedings.

AFFIRMED.