IN THE COURT OF APPEALS OF IOWA

No. 1-753 / 10-2068
Filed November 23, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AARON DAVID KATES,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Todd A. Hensley, District Associate Judge.

Aaron Kates appeals from the judgment and sentence entered on his conviction to operating while intoxicated, third offense, and driving while license revoked. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Patrick Jennings, County Attorney, and Athena Ladeas, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Aaron Kates appeals from the judgment and sentence entered on his conviction to operating while intoxicated, third offense, in violation of Iowa Code section 321J.2(1) (2009), and driving while license revoked, in violation of section 321J.21. Kates contends the district court erred in failing to grant his motion for judgment of acquittal based on the insufficiency of the evidence to support his conviction. He further argues his counsel was ineffective for failing to object to prior bad acts evidence. We conclude the evidence in the record, viewed in the light most favorable to the jury's verdict, supports both alternatives for his conviction for operating while intoxicated. The evidence of Kates's guilt was not overwhelming but was sufficient to support the conviction and outweighs any unfairly prejudicial effect from the single, isolated, and unacknowledged reference in the law enforcement videotape that insinuated Kates's commission of a prior bad act and did not affect the outcome of the proceeding. We therefore affirm Kates's conviction and sentence.

I. Background Facts and Proceedings.

At approximately 1:00 a.m. on October 11, 2009, Sioux City Police Officer Thomas Gill observed Kates driving his vehicle through a parking lot without activating his headlights. When Kates turned onto a street and still did not activate his headlights, Officer Gill initiated a stop of his vehicle. Officer Gill spoke with Kates and noticed he emitted the odor of alcoholic beverage and observed he had bloodshot, watery eyes. Kates stated he had consumed one beer at a bar about an hour earlier. Officer Gill arrested Kates for a traffic

violation and, suspecting Kates was under the influence of alcohol, arranged for an Alcohol Safety Action Program (ASAP) officer to meet them at the jail.

At the Sioux City jail, ASAP Officer Brad Echter also noticed the smell of alcoholic beverage emanating from Kates. Kates failed three field sobriety tests: the horizontal gaze nystagmus, the walk and turn, and the one-leg stand. He consented to a chemical test, which indicated a blood alcohol concentration of .091. Kates later changed his story about how much alcohol he had consumed, stating he had "a few," and later admitted he had drank a Long Island iced tea and a bottle of Budweiser Select beer.

Kates was charged with operating while intoxicated, third offense, and driving while license revoked. He entered a written plea of guilty to the charge of driving while license revoked. A jury trial was held over two days in October 2010. To find Kates guilty of operating while intoxicated, the jury was instructed it had to find:

> 1. On or about the 11th day of October 2009, the defendant operated a motor vehicle.
> 2. At the time, the defendant either: (a) was under the influence of alcohol or (b) had an alcohol content of .08 or more.
>
> (It is not necessary that all jurors agree to just (a) or (b). It is only necessary that all jurors agree to at least one of the two alternatives.)

The jury returned a general verdict of guilty. Kates stipulated to his prior operating while intoxicated offenses. He was sentenced to an indeterminate five-year term of incarceration and a $3125 fine.

II. Motion for Judgment of Acquittal.

Kates contends the district court erred in failing to grant his motion for judgment of acquittal based on the insufficiency of the evidence to support his

conviction. As Kates points out, in order to find him guilty of operating while intoxicated, the jury had to find that he committed one of two alternatives: (1) operated a motor vehicle while under the influence of alcohol, and/or (2) operated a motor vehicle while having an alcohol concentration of .08 or more. Kates alleges the State failed to prove beyond a reasonable doubt the alternative that he was "under the influence" when he operated his vehicle.

Kates correctly recites that where the jury is instructed in the alternative, and there is insufficient evidence to support one of the alternatives, a general guilty verdict will be overturned even if other alternatives are clearly established in the record. *See State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996) ("With a general verdict of guilty, we have no way of determining which theory the jury accepted.").

Here, however, we find the evidence in the record, viewed in the light most favorable to the jury's verdict, supports both alternatives for the charge of operating while intoxicated. In reaching this conclusion we rely upon: Kates's failure to activate his headlights as grounds for the stop; his odor of alcoholic beverage; bloodshot, watery eyes; admission of consuming alcohol; failure of three field sobriety tests; the chemical test establishing a blood alcohol concentration of .091; as well as testimony from two investigating officers, one of which is highly trained in the investigation of OWIs and the determination of intoxication. Accordingly, the district court correctly sustained Kates's motion for judgment of acquittal. *See* Iowa R. App. P. 6.903 (correction of errors at law standard of review); *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006)

(observing evidence in the record must be able to "convince a rational jury of the defendant's guilt beyond a reasonable doubt").

III. Ineffective Assistance of Counsel.

Kates also asserts he received ineffective assistance of counsel due to trial counsel's failure to object to evidence indicating his prior OWI offenses. Kates must establish that his trial counsel rendered ineffective assistance to reach the merits of this issue on appeal. *See State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) ("Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules."). Our review of ineffective assistance of counsel claims is de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *Fountain*, 786 N.W.2d at 265-66. The claim fails if either element is lacking. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). The applicant must overcome a strong presumption of counsel's competence. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995); *see also Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S. Ct. 1388, 1404, 179 L. Ed. 2d 557, 560-61 (2011).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *Bearse*, 748 N.W.2d at 214. These claims are typically better suited for postconviction relief proceedings that allow the development of a sufficient record, and permit the accused attorney to respond to defendant's claims. *Id.* We must determine if the record is adequate to decide the claim on direct appeal or we may preserve the claim for postconviction relief proceedings.

Id. Here, neither party suggests we should preserve Kates's ineffective assistance claim for postconviction proceedings, and we believe the record is adequate to address his claim.

Specifically, Kates contends his counsel was ineffective for failing to ensure and object to a portion of the law enforcement booking video presented at trial. During the video, Officer Echter informed Kates he was being charged with driving while license revoked and failure to have an ignition interlock device installed on his vehicle. Kates argues this statement constituted inadmissible prior bad acts evidence as it essentially divulged his prior OWI convictions and did not fall within any of the purposes listed in Iowa Rule of Evidence 5.404(*b*). He further asserts the statement was not relevant and he suffered substantial prejudice from the admission of the evidence. As Kates contends,

> The charges of driving while revoked and failing to install an ignition interlock device are a result of defendant's prior OWI convictions. To allow the jury to learn of these charges was tantamount to informing the jury that the defendant had one or more prior OWI convictions.

However, the comment to Kates's other charges was an isolated reference that occurred thirty-eight minutes in to the fifty-minute video recording. We further note a person can have a license revoked for a number of reasons that do not stem from an OWI conviction. *See* Iowa Code §§ 321.209, 321.560.

An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either of the two prongs of such a claim. *Anfinson*, 758 N.W.2d at 499. Accordingly, we need not determine whether counsel's performance was deficient before examining the prejudice prong of an

ineffectiveness claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). To resolve this issue, we focus on the prejudice prong of Kates's claim.

To establish prejudice, a defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984); *accord Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006); *see State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *accord Maxwell*, 743 N.W.2d at 196.

Upon our review, we conclude Kates cannot show a reasonable likelihood he would have been acquitted by the jury had the jury not heard the evidence indicating a prior OWI offense. In testimony at trial, Officer Gill stated Kates was driving his vehicle in the early morning hours of October 11, 2009, and Kates's failure to activate his headlights was the reason for the stop. Officers Gill and Echter both testified Kates emitted the odor of alcohol beverage. Officer testimony indicated Kates's eyes were bloodshot and watery and Kates admitted he had consumed alcohol. Kates failed three field sobriety tests. Kates's chemical test results established his blood alcohol concentration was .091. *See* Iowa Code § 321J.2(1)(b) (providing that a person commits the offense of OWI if the person operates a motor vehicle while having an alcohol concentration of .08 or more). Although the evidence is not overwhelming, here Kates was observed by not one but two officers, including Officer Echter, who is highly trained in the investigation of OWIs and the determination of intoxication. The testimony of the

two officers supports the conclusion there was sufficient evidence Kates was under the influence of alcohol at the time he operated his vehicle. *See id.* § 321J.2(1)(a) (providing that a person commits the offense of OWI if the person operates a motor vehicle while under the influence of an alcoholic beverage).

The reference in the video was isolated, unacknowledged, and not discussed at any other time. In terms of an isolated violation of a motion in limine, our supreme court has held that a single error in failing to redact information, although it should not be admitted, does not deprive the defendant of a fair trial. *See State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006).

We conclude trial counsel was not ineffective in failing to ensure the portion of the law enforcement booking video was redacted so the jury would not hear evidence of Kate's other charges. Although not overwhelming, the evidence of Kates's guilt outweighs any unfairly prejudicial effect from the isolated comment that may have suggested a prior OWI conviction. Accordingly, we conclude the admission of such evidence did not affect the outcome of the proceeding. *See, e.g.*, *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (observing prejudice exists when it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged breach); *Maxwell*, 743 N.W.2d at 195 (requiring defendant to show both that counsel failed to perform an essential duty and that prejudice resulted in order to prevail on a claim of ineffective assistance of counsel).

IV. Conclusion.

Upon consideration of both issues raised on appeal, we affirm Kates's conviction and sentence.

AFFIRMED.