

IN THE COURT OF APPEALS OF IOWA

No. 3-889 / 12-1251
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS ANTHONY DUGAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Guthrie County, Gregory A. Hulse (pre-trial motion) and Randy V. Hefner (trial), Judges.

Thomas Dugan appeals from his conviction of homicide by vehicle.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Mary Benton, County Attorney, and Douglas Hammerand, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Bower, JJ.

DOYLE, J.

Thomas Dugan appeals from his conviction of homicide by vehicle. He challenges the sufficiency of the evidence to support his conviction, and he contends the district court erred in admitting evidence concerning his blood test results and other irrelevant and prejudicial evidence, including hearsay and prior-bad-acts evidence. He also asserts his trial counsel rendered ineffective assistance. Upon our review, we affirm his conviction and preserve his ineffective-assistance-of-counsel claims for future postconviction relief proceedings.

I. Background Facts and Proceedings.

Viewing the trial evidence in the light most favorable to the jury's guilty verdict, see *State v. Romer*, 832 N.W.2d 169, 172 (Iowa 2013), the jury could have found the following facts: around six a.m. on August 23, 2009, Thomas Dugan called 911 on his cell phone, requesting help. Dugan reported to the dispatcher he had "no clue" where he was, and he stated his arm was broken. The dispatcher was able to determine Dugan's location using Dugan's cell phone's GPS coordinates, and a police officer, as well as fire and emergency medical services personnel, were dispatched to Dugan's location.

There, personnel observed a vehicle on its top in a bean field, and they discovered a body, later identified as Adam Anderson, nearby in the field. Dugan was also found nearby, yelling for Anderson. Dugan was covered with blood, and he had multiple injuries, including a two-inch laceration under his chin and several injuries to his facial area and right ear. Two officers that spoke to Dugan—one at the scene and another at the hospital after Dugan was

transported there—smelled an odor of an alcoholic beverage coming from Dugan and observed Dugan's eyes were bloodshot. The emergency medical technician who first talked to and treated Dugan at the scene also smelled the odor of an alcoholic beverage on Dugan. Additionally, two beer cans were found at the scene.

An investigation of the accident followed. The vehicle, a Ford Mustang owned by Anderson, had extensive damage to its front, rear, and roof areas, and it was missing both passenger-side wheels. Blood was found inside the vehicle, mostly contained on the driver's-side headliner. Evidence was taken from the vehicle for DNA testing, including the airbags from both sides of the vehicle, as well as blood, hair, and saliva from the steering wheel and from the inside of the windshield on the driver's side, where it was pushed out and had a spidering effect from impact.

Due to Anderson's positioning in the field, it was believed he had been ejected from the vehicle. Anderson's external injuries were not extensive; he had multiple cuts on the right side of his forehead and a small scrape on his nose, along with a few other scrapes on his hand, arm, and leg. His internal injuries also were not extensive, but he suffered a brain injury, possibly from being ejected from the vehicle. He did not suffer any injuries to his chest consistent with impact from a steering wheel.

DNA profiles were developed from cuttings of the driver's-side airbag and the driver's-side headliner by Iowa Division of Criminal Investigation (DCI) criminologists, and both profiles matched Dugan's DNA profile. Blood found on

the steering wheel and the driver's-side seat belt also matched Dugan's DNA profile. None of the evidence tested matched Anderson's DNA profile.

At the scene of the accident, the responding police officer asked Dugan questions about the accident, including who was the driver of the vehicle. Although Dugan was conscious, Dugan did not reply to any of the officer's question. However, Dugan told his treating emergency medical technician at the scene he was the passenger in the vehicle. The EMT observed "a red mark across [Dugan's] hips that could have been caused by a lap [seat] belt." The EMT believed Dugan's injuries were consistent with being a passenger in the vehicle, based upon her own experience of being involved in a crash, but she admitted she did not have any specialized training to make such determination. Dugan told a trooper at the hospital the morning of the accident that he did not remember what had occurred, except he could remember that he was the passenger in the car and Anderson was driving. At the hospital, Dugan also told the responding fire department chief that drove the ambulance to the scene, Anderson was driving the vehicle.

Despite Dugan's statements to the contrary, law personnel concluded Dugan was the driver of the vehicle, and Dugan was ultimately charged with homicide by vehicle, in violation of Iowa Code sections 707.6A(1) and 321J.2 (2009), for unintentionally causing Anderson's death while operating Anderson's vehicle intoxicated. A jury trial followed.

At trial, several acquaintances of Dugan and Anderson testified they observed both men drinking at bars the night of the accident, following a class reunion. Although two witnesses at the bar at closing time testified Dugan was

very intoxicated, other witnesses there testified they did not observe any signs that Dugan was under the influence of alcohol. The bar owner who served both Dugan and Anderson alcoholic beverages at the bar testified he did not see any signs either man was intoxicated.

Lea Creese and other friends at the bar testified the men planned to go to Creese's house after the bar closed. One friend testified Dugan had asked her to come with him and Anderson to the after party, and Dugan bragged to her about driving Anderson's Mustang, as if it were Dugan's vehicle. Another friend testified that when everyone was getting ready to leave, Anderson "held up his keys and said, 'Who's driving, because I can't?'" She further testified she reached for Anderson's keys, but Dugan got them first, telling her he and Anderson were "going to go party." She testified the last time she saw Dugan, he had Anderson's car keys. The bar owner testified he saw Dugan twirling a set of keys on his finger, but he did not know to whom the keys belonged. He testified he did not see any keys in Anderson's hands.

Lea Creese testified the plan that evening was for Dugan and Anderson to come to her house after the bar closed, because she lived a few blocks away from Dugan. She testified Dugan initially agreed to ride home with her, but "as time went on, it was very apparent [Anderson] had been drinking, and so [Dugan decided] that it probably wasn't safe for [Anderson] to be by himself." She testified several people tried to get Anderson to give his keys to someone, stay at someone's house, and then get his car in the morning, but Anderson "was furious," and "[h]e would not give his keys up." She testified she saw Dugan trying to get Anderson's keys, but she was not sure if he was successful. She

testified it was her understanding that when Dugan and Anderson left the bar, Anderson would be driving, and they would follow her, or she would follow them to her house. However, they left before her.

None of the witnesses saw the men getting into Anderson's vehicle or driving away from the bar in Anderson's vehicle that night. Creese looked for the men on her way home, but she did not find them. The men never arrived at Creese's home.

The officer who responded to the accident testified that, based upon his prior investigations, Dugan's chin laceration was consistent with impact with the steering wheel of the vehicle, and he opined Dugan was driving the vehicle on the night of the accident. He testified Anderson did not have any injury on his chin like Dugan had, and extensive amounts of blood were found on the driver's side of the vehicle, including blood on the steering wheel, windshield, headliners, and driver's-side air bag. A trooper who obtained a blood specimen from Dugan at the hospital testified that chin injuries, like Dugan's, typically correspond with an air-bag- or steering-wheel-type collision.

Another trooper involved in the investigation observed Dugan's injuries after Dugan was admitted to the hospital. He testified Dugan's chin injury was "curved in a manner which would line up with the steering wheel," and Dugan had injuries to his feet. He too opined Dugan was the driver of the vehicle, explaining:

the injuries that [Dugan] sustained to the facial chin area, and looking at photographs, and seeing him in person, also looking at the photographs of injuries to his feet which would be made from the pedals. . . .

. . . .

The clutch, the brake and the gas pedal are all metal. [T]he back part of the pedal underneath side has got the edging that feet can be caught, and . . . injuries would be sustained during this matter. Where on the passenger's side of the vehicle there's nothing there for your feet to hook up on. Underneath the dash would leave different marks, injuries sustained if that would be the case.

The trooper noted he reviewed autopsy photographs of Anderson, and Anderson did not have injuries to his feet or leg area. The trooper also took into consideration the "hair blood sample" taken from the driver's side windshield, which matched Dugan's DNA profile. He testified that was important evidence, explaining that "[i]f you're in the driver seat in your head hits forward, that will push the windshield glass out," and, because of the amount of force it takes to break the windshield, "you would leave samples of hair or blood at initial contact with that area." Additionally, based upon his investigation and comparisons of other investigations he had conducted looking at vehicle damage and speed, the trooper estimated the speed of the vehicle was between 80 and 100 miles-per-hour when the vehicle left the road.

DCI criminalist supervisor Robert Monserrate testified he tested Dugan's blood specimen, drawn at 2:10 p.m. the afternoon of the accident, and it showed a blood alcohol level of 0.024 grams of alcohol per 100 ml of blood. Over Dugan's objection, Monserrate testified he was able to estimate Dugan's earlier blood alcohol levels using retrograde extrapolation, an approximation method using alcohol burn off rates and averages as learned in scientific studies. He opined that using retrograde extrapolation, Dugan's approximate blood alcohol levels were 0.099 at 6:10 a.m., 0.114 at 5:10 a.m., 0.129 at 4:10 a.m., 0.144 at 3:10 a.m., and 0.159 at 2:10 a.m. Monserrate also testified, over Dugan's

objection, Iowa's "per se level for a test" is 0.080 grams of alcohol per 100 ml of blood.

Dugan testified his memory of the night of the accident was "blotchy," and he only remembered bits and pieces. He testified he remembered having three beers and a shot at the last bar he and Anderson were at before they headed to Creese's house, but he did not remember leaving the bar. He testified he did not drive Anderson's car; he was the passenger in the vehicle. Dugan testified he had worn flip-flops that night, and he acknowledged one of his flip-flops was found on the driver's side floor with blood drops on the bottom of it. He testified he did not know or remember if he was intoxicated the night of the accident.

The jury found Dugan guilty of homicide by operating a motor vehicle while under the influence of alcohol. Dugan now appeals.

II. Discussion.

On appeal, Dugan challenges the sufficiency of the evidence to support the jury's verdict, and he contends the district court erred in admitting evidence concerning his blood alcohol test results, as well as other irrelevant and prejudicial evidence, including hearsay and prior bad acts evidence. He also asserts his trial counsel rendered ineffective assistance. We address his arguments in turn.

A. Sufficiency of the Evidence.

We review a claim that insufficient evidence supports a conviction for errors at law. *State v. Romer*, 832 N.W.2d 169, 174 (Iowa 2013). We will uphold the jury's verdict unless there is an absence of substantial evidence in the record to sustain it. See *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

“Substantial evidence” is the kind of proof that could “convince a rational jury that the defendant is guilty beyond a reasonable doubt.” *Id.* In assessing the sufficiency of the evidence, we “consider all the evidence presented, not just the inculpatory evidence,” *id.*, and “we find circumstantial evidence equally as probative as direct.” *State v. Meyers*, 799 N.W.2d 132, 146 (Iowa 2011). We follow the “long-standing admonition” to consider the facts in a light most favorable to upholding the jury’s verdict, and in doing so, we indulge all legitimate inferences and presumptions that may be fairly and reasonably deduced from the evidence offered at trial. *See id.*; *see also State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). “Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury is free to reject certain evidence, and credit other evidence.” *Sanford*, 814 N.W.2d at 615 (internal quotation marks, alteration marks, and citation omitted).

Iowa Code section 707.6A, “Homicide or serious injury by vehicle,” subsection (1) provides that a “person commits a class ‘B’ felony when the person unintentionally causes the death of another by operating a motor vehicle while intoxicated.” The district court instructed the jury that the State must prove the following three elements to enter a guilty verdict on that charge:

- (1) On or about the 23rd day of August 2009, [Dugan] operated a motor vehicle;
- (2) At that time [Dugan] was under the influence of alcohol;
- (3) [Dugan’s] acts set out in elements 1 and 2 unintentionally caused the death of [Anderson].

As to element three, our supreme court has recently restated that “the State must prove a causal connection between the defendant’s intoxicated driving and the victim’s death.” *State v. Adams*, 810 N.W.2d 365, 370-71 (Iowa 2012). The court explained:

Although the statute does not impose a burden on the State to prove a specific causal connection between the defendant’s intoxication and the victim’s death, it does require proof of a factual causal connection between a specific criminal act—“intoxicated driving”—and the victim’s death. Put another way, the statute demands more than mere proof that the defendant’s driving caused the death of another person. A defendant may be found guilty of homicide by vehicle only if the [fact finder] finds beyond a reasonable doubt that his criminal act of driving under the influence of alcohol caused the victim’s death.

Id. at 371.

On appeal, Dugan contends the State failed to demonstrate each element required under section 707.6A beyond a reasonable doubt. We disagree. As noted above, the jury was free to reject certain evidence and accept other evidence, see *Sanford*, 814 N.W.2d at 615, and circumstantial evidence is equally as probative as direct evidence. See *Meyers*, 799 N.W.2d at 146.

First, although Dugan told several persons after the accident he was not the driver, the evidence presented at trial substantially supports the jury’s finding he was operating the vehicle at the time of the accident. Although no one saw him and Anderson leave the bar, two witnesses saw him take Anderson’s keys before leaving. Furthermore, all of Dugan’s injuries were consistent with driving the vehicle at the time of the accident, and Anderson’s injuries were consistent with him being the passenger in the vehicle at the time of the accident. Additionally, Dugan’s blood was found on numerous items on the driver’s side

vehicle, including the windshield, the steering wheel, the driver's-side airbag, and the driver's-side seat belt. His shoe was found on the floor on the driver's side with his blood on it, and his feet were injured consistent with having struck the pedals on the driver's side. Viewing the evidence in a light most favorable to the jury's verdict, we conclude substantial evidence supports its finding Dugan was the operator of the vehicle at the time of the accident.

Additionally, Dugan admitted to consuming alcohol at the bar, though he stated he had no personal knowledge as to whether he was intoxicated that night. Creese did not specifically testify Dugan was intoxicated, but she testified she was worried about everyone getting home that night and Dugan was going to ride with her. Two witnesses testified that Dugan was very intoxicated when he and Anderson left the bar that night. The responding officer and EMT, along with a trooper who later visited Dugan at the hospital, all smelled an odor of an alcoholic beverage coming from Dugan hours later, and the officers observed his eyes were bloodshot. Viewing the evidence in a light most favorable to the jury's verdict, substantial evidence supports its finding Dugan was under the influence of alcohol at the time he was operating Anderson's vehicle.

Finally, although there were no eyewitnesses, the investigating trooper estimated that based upon his investigation and comparisons of other investigations he had conducted looking at vehicle damage and speed, the speed of the vehicle at the at time it left the road was between 80 and 100 miles-per-hour—in excess of the speed limit. Consequently, viewing the evidence in a light most favorable to the jury's verdict, substantial evidence supports its

determination that Dugan's criminal act of driving under the influence of alcohol caused Anderson's death.

Accordingly, we conclude the jury's verdict is supported by substantial evidence as to all elements of the crime, and we affirm on this issue.

B. Blood Test Evidence.

1. Error Preservation.

Dugan also asserts the district court erred in not excluding "[t]he blood test in the instant matter." However, his arguments as to why the court erred are not a model of clarity. He questions, in various sentences, the reliability and accuracy of the blood-alcohol-content test results of the blood drawn from Dugan at 2:10 p.m.; the legislature's intent in limiting a per se finding of a person's blood alcohol concentration to a test given within two hours of driving, as set forth in Iowa Code section 321J.6(2). He also asserts the district court's violation of the separation of powers doctrine by allowing Monserrate to testify concerning his estimates using retrograde extrapolation. However, upon our review of the record, we find Dugan failed to raise these "claims" before the district court. Accordingly, he has failed to preserve these claims for our review. See *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal.").

Dugan also raises the claim in the form of an ineffective-assistance-of-counsel claim for which the normal error preservation rules do not apply. See *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). Generally, ineffective-assistance-of-counsel-claims "are preserved for postconviction to allow trial

counsel an opportunity to defend the charge. We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim." *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa Ct. App. 1996). We find the record inadequate to address these claims, and we preserve them for postconviction relief. See *State v. Carroll*, 767 N.W.2d 638, 646 (Iowa 2009).

We find Dugan preserved error concerning his objections to the district court's rulings allowing Monserrate to testify as to Iowa's legal blood limit of 0.08 grams of alcohol per 100 ml of blood and his estimates of Dugan's earlier blood alcohol level using retrograde extrapolation. On appeal, Dugan contends the district court abused its discretion in allowing this evidence because the evidence was speculative, irrelevant, and highly prejudicial.

We review evidentiary rulings, including the admissibility of expert testimony, for an abuse of discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001). "When a trial court has exercised its discretion to admit expert testimony, we will reverse only if we find an abuse of that discretion and prejudice." *State v. Myers*, 382 N.W.2d 91, 93 (Iowa 1986). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Redmond*, 803 N.W.2d 112, 117 (Iowa 2011) (citation omitted). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001).

2. 0.08 Limit.

Here, the district court specifically instructed the jury:

You heard testimony that it is against the law in this state to operate a motor vehicle with a blood alcohol level of 0.08 or higher. That law is not applicable in this case. Instead, you must look to [the prior instruction] to determine whether [Dugan] was under the influence of alcohol.

The prior instruction stated:

A person is “under the influence” when, by drinking liquor and/or beer, one or more of the following is true:

1. His reason or mental ability has been affected.
2. His judgment is impaired.
3. His emotions are visibly excited.
4. He has, to any extent, loss control of bodily actions or motions.

“A jury is presumed to have followed its instruction absent evidence to the contrary.” *State v. Morrison*, 368 N.W.2d 173, 176 (Iowa 1985); see also *State v. Becker*, 818 N.W.2d 135, 162 (Iowa 2012) (stating, where a court instructed jurors not to concern themselves with the consequences of a particular verdict, “[w]e must presume the jurors followed that instruction and did not consider the consequences when engaging in their deliberations.”). Here, there is no evidence the jury did not follow the instructions in this case. Upon our review, we find the district court did not abuse its discretion in allowing Monserrate to testify concerning the limit of 0.08.

3. Retrograde Extrapolation.

Additionally, Iowa is committed to a liberal view on the admissibility of expert testimony, and this court is deferential to the discretion of the district court in this area. See *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 531 (Iowa 1999). “If scientific, technical, or other specialized knowledge will assist

the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Iowa R. Evid. 5.702. An expert witness need not be a specialist, but the testimony must be within their general area of expertise. *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 687 (Iowa 2010). The proponent of the expert has the burden of demonstrating the expert’s qualifications and reliability to the court. *Id.* at 686. “[T]rial courts have a well-recognized role as guardians of the integrity of expert evidence offered at trials.” *Id.*

Here, the district court ruled if the State laid adequate foundation for Monserrate’s expert testimony, Monserrate’s testimony would be relevant to show “[t]he fact that the test result showed alcohol in [Dugan’s] system” and would not be “unnecessarily confusing” to the jury. We agree. The State presented Monserrate’s curriculum vitae, and Monserrate testified as to his training and expertise in forensics and blood testing, including his experience with retrograde extrapolation to estimate prior blood alcohol levels, establishing his sufficient qualification to testify as an expert in that field. Monserrate testified about the process of retrograde extrapolation, noting the estimates were only approximations, and he conceded there were many factors that could change the exact blood alcohol level of a person. However, he explained in detail his personal studies and knowledge as to outliers in extrapolating blood alcohol levels, and he testified as to why his estimated extrapolated levels of Dugan’s prior blood alcohol levels were reliable. We find this evidence was based on Monserrate’s years of experience, observations, and logic, and the evidence was

relevant to the jury's determination of whether Dugan, in fact, operated the vehicle while under the influence of alcohol. We conclude the district court did not abuse its discretion in permitting Monserrate to testify as to his estimates of Dugan's blood alcohol levels prior to the extraction of his blood sample through the use of retrograde extrapolation. We therefore affirm on this issue.

C. Other Evidentiary Rulings.

Finally, Dugan asserts the district court erred "in allowing the admission of prior bad acts evidence, hearsay evidence, speculation, irrelevant evidence, and evidence more prejudicial than probative." "We review the district court's evidentiary rulings for abuse of discretion," *State v. Thompson*, 836 N.W.2d 470, 476 (Iowa 2013), including its "evidentiary rulings regarding the admission of prior bad acts." *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010). As noted above, "[a]n abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Rodriguez*, 636 N.W.2d at 239. However, "[r]ulings on the admissibility of hearsay evidence are reviewed for correction of errors at law." *Thompson*, 836 N.W.2d at 476.

All evidence, hearsay or otherwise, is subject to exclusion if it is not relevant. Iowa R. Evid. 5.401. Relevant evidence is defined in our rules as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* Nevertheless, "[a] trial court's erroneous admission of evidence is only reversed on appeal if 'a substantial right of the party is affected.'" *State v. Redmond*, 803 N.W.2d 112, 127 (Iowa 2011)

(citation omitted); see also Iowa R. Evid. 5.103(a). When the party claims nonconstitutional error, as here, “prejudice occurs when the party has been injuriously affected by the error or has suffered a miscarriage of justice.” *Redmond*, 803 N.W.2d at 127 (internal quotation marks, alteration, and citations omitted). If the erroneous evidentiary ruling does not cause prejudice, the error is harmless. *Id.*

Though deemed relevant, such evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Iowa R. Evid. 5.403; see also *State v. Newell*, 710 N.W.2d 6, 20 (Iowa 2006). Unfair prejudice arises when evidence has “an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one.” *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001). Evidence that is unfairly prejudicial “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case.” *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988) (citation omitted). “Because the weighing of probative value against probable prejudice is not an exact science, we give a great deal of leeway to the trial judge who must make this judgment call.” *Newell*, 710 N.W.2d at 20-21.

“‘Hearsay’ is 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). Generally, hearsay is not admissible unless it fits within one of several recognized hearsay exceptions. Iowa R. Evid.

5.802. However, an out-of-court statement is not regarded as hearsay when it is offered only to explain responsive conduct and not to show the truth of the matter asserted. *State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011). If hearsay evidence is admitted over a proper objection, prejudicial error is presumed unless the record shows “the hearsay evidence did not affect the jury’s finding of guilt.” *Id.*

Evidence of a defendant’s prior bad acts is not admissible under rule 5.404(b) to show “the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Iowa R. Evid. 5.802. Prior-bad-acts evidence is “relevant and material” when the evidence relates “to some legitimate issue other than a general propensity to commit wrongful acts.” *State v. Duncan*, 710 N.W.2d 34, 40 (Iowa 2006). If the State offers evidence of a defendant’s prior bad acts, the prosecutor must “articulate a valid, non-character theory of admissibility.” *State v. Sullivan*, 679 N.W.2d 19, 28 (Iowa 2004).

Several witness testified Dugan was “hitting on” women at the bar the night of the accident and that he even tried to kiss a few, though he knew they were married. One witness testified that Anderson told Dugan to stop flirting because the witness “was married,” and Anderson and Dugan had argued that night about a prior altercation. The witness also testified Anderson stated at the end of the night, “Who’s driving, because I can’t?” Dugan asserts these statements were irrelevant, offered to show the truth of those matters, and offered to evidence he was a bad man.

Upon our review, we conclude the witness's testimony as to Anderson's statement asking who was going to drive him that night was relevant and admissible to show Dugan's responsive conduct to Anderson's statement, and the evidence's probative value outweighed its prejudicial effect. Concerning the remaining testimony highlighted above, we have serious doubts as to its relevance, but we conclude its admission was harmless. First, the challenged testimony had little evidentiary value. Further, Creese, Dugan's own witness, testified and explained Dugan's social nature and, though Dugan's behavior might seem as flirting to those he did not know as well, she knew it was just him and his way of being friendly. Moreover, Dugan admitted he was drinking that night, and he tested positive for alcohol twelve hours after the bar closed. We think the strength of the State's case as to Dugan's intoxication, combined with the slight evidentiary value of the flirting and fight, affirmatively establishes that even if the statements were hearsay, their admission did not prejudice Dugan. Finally, we do not find the statements were evidence of any prior bad acts by Dugan.

Additionally, for the reasons stated above, we conclude Monserrate's testimony concerning his estimates using retrograde extrapolation was relevant to the intoxication issue before the jury, and his testimony's probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. We therefore affirm on this issue.

IV. Conclusion.

We have carefully considered all of the claims raised by Dugan. Those not addressed specifically in this decision are either disposed of by our resolution

of other claims or are without merit, with the exception of the blood-test-evidence claims we preserve for future postconviction relief. Accordingly, we affirm Dugan's conviction and sentence.

AFFIRMED.