

IN THE COURT OF APPEALS OF IOWA

No. 6-1069 / 06-0597
Filed February 14, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDWARD ALLEN ELSBERRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Frederick E. Breen, District Associate Judge.

Edward Elsberry appeals from his conviction for driving under revocation.
CONVICTION VACATED; REMANDED FOR NEW TRIAL.

Patricia Reynolds, Acting State Appellate Defender, and Greta Truman, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Timothy N. Schott, County Attorney, and Jennifer Weaver, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

BAKER, J.

Edward Elsberry appeals from his conviction for driving under revocation, in violation of Iowa Code section 321J.21 (2005). We vacate his conviction and remand for a new trial.

Background Facts and Proceedings.

On November 17, 2005, Gowrie Police Chief Bruce McCormack stopped Elsberry as he was driving in downtown Gowrie. Finding that Elsberry's driver's license had been revoked, McCormack cited him for driving under revocation. At a subsequent jury trial, the State offered a redacted copy of Elsberry's driving record [State's Exhibit 3] which included an "Official Notice" from the Iowa Department of Transportation informing Elsberry as follows:

You are hereby notified that effective 10-23-2004 your privileges to operate and register motor vehicles are revoked under the provisions of Section(s) 321J.9 & 321A.17 of the Code of Iowa UNTIL 10-20-2006.

Pursuant to Iowa Code section 321.10, which provides that certified DOT records shall be admissible in evidence, the State admitted this exhibit in lieu of calling employees of the DOT to testify in person.

At the close of evidence, the court instructed the jury, in pertinent part, as follows:

Instruction No. 9

The State must prove both of the following elements of the offense of Driving Under Revocation:

1. On or about November 17, 2005, the Defendant drove a motor vehicle in this State.
2. At that time the Defendant was revoked from operating a motor vehicle due to a violation of Chapter 321J of the Code of Iowa.

Against Elsberry's due process objections, the court also gave the following instruction:

Instruction No. 10

The revocation referred to in Exhibit 3 [the certified driving record] was a revocation for violation of Chapter 321J of the Code of Iowa.

The jury returned a guilty verdict and the court later sentenced Elsberry to a term of incarceration of six months and suspended all but four days. The court also imposed a \$1000 fine. Elsberry appeals from this conviction contending that Instruction No. 10 violated his rights to due process and "lessened the State's burden" of proof by instructing the jury that his revocation was for a violation of chapter 321J.

Scope of Review.

When assessing alleged violations of constitutional rights, our standard of review is *de novo*. *State v. Washburne*, 574 N.W.2d 261, 263 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello*, 602 N.W.2d 190, 195 (Iowa Ct. App. 1999).

Discussion.

As noted, Elsberry contends Instruction No. 10 lessened the State's burden to prove an essential element of the crime of driving under revocation. In particular, he maintains that whether State's Exhibit 3 in fact evidenced a revocation due to a violation of chapter 321J was a matter for the jury to decide and the State to prove. For the reasons that follow, we agree.

In *In re Winship*, 397 U.W. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970), the Supreme Court explicitly held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable

doubt of every fact necessary to constitute the crime with which he is charged.”
See *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976). Furthermore, it is without
debate that

[t]he trial court may not direct a verdict against the accused
on any element of an offense, or direct a verdict of conviction,
except on a plea of guilty, no matter how overwhelmingly the
evidence may point in that direction.

23A C.J.S. *Criminal Law* § 1733 (2006). See also *State v. Dunne*, 234 Iowa
1185, 1190, 15 N.W.2d 296, 299 (1944) (“[i]n the absence of an admission by the
adverse party, it is not often proper to instruct that a party having the burden of
proof on any question has established his claim as a matter of law.”). We
recognize that the second element of the marshalling instruction is typically
stipulated. In this case, however, there was no stipulation that Elsberry was
under a revocation.

The State asserts that Instruction No. 10 is similar to Iowa Uniform
Criminal Jury Instruction No. 200.21 which permits a court to instruct the jury that
a particular weapon is a “dangerous weapon” and Civil Instruction 3700.3, which
permits a court to instruct that a certain offense is a “sexually violent offense.”
We find this analogy unconvincing. In the State’s cited examples, those
weapons and offenses are specifically statutorily defined. See Iowa Code §§
702.7 and 229A.2(10)

While perhaps seemingly hyper-technical since it should not have been a
difficult matter for the State to meet its burden to establish element (2) of the
marshalling instruction, we must agree with Elsberry’s position. Instruction 10,
which mirrored and fully answered an essential element of the crime, effectively

directed a verdict on an essential element of the crime with which Elsberry was charged. This was improper and deprived Elsberry of his constitutional rights to due process.

Notwithstanding this conclusion, we will not reverse a conviction based on an error in instructing the jury unless the error is prejudicial to the defendant. *State v. Holtz*, 548 N.W.2d 162, 164 (Iowa Ct. App. 1996). A jury instruction error is presumed prejudicial unless upon a review of the entire case, we find the error resulted in no prejudice. *State v. Bone*, 429 N.W.2d 123, 127 (Iowa 1988). Where the instruction constitutes constitutional error, the burden is on the State to show the error “was harmless beyond a reasonable doubt.” *State v. Miles*, 344 N.W.2d 231, 235 (Iowa 1984). It is a fundamental tenet of our system of criminal justice that the State holds the burden to establish essential elements of the charged crime beyond a reasonable doubt. The court’s instruction improperly relieved the State of this burden. We therefore vacate the conviction and remand for a new trial.

CONVICTION VACATED; REMANDED FOR NEW TRIAL.