

IN THE COURT OF APPEALS OF IOWA

No. 8-102 / 06-0795
Filed May 14, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMY THOMAS PITZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard, II (motion to suppress) and Mitchell E. Turner (trial), Judges.

Defendant appeals from his conviction of operating while intoxicated.

AFFIRMED.

Richard A. Bartolomei, Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Janet M. Lyness, County Attorney, and Iris Frost, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Defendant appeals his conviction for operating while intoxicated, second offense. He contends (1) the district court erred in allowing into evidence results of a breath test taken with a DataMaster cdm testing device, (2) Iowa Code section 321J.15 (2003), as construed by *State v. Stohr*, 730 N.W.2d 674 (Iowa 2007), is unconstitutional, (3) the court erred in allowing a DCI criminalist to estimate the number of drinks the defendant had consumed based on the breath test results, and to give opinion testimony as to his impairment, and (4) the court erred by instructing the jury twice that it did not have to unanimously agree on a theory or factual basis when reaching a verdict. We affirm.

I. BACKGROUND.

On June 15, 2004, at approximately 1:44 a.m., officer Darin Zacharias of the Iowa City Police Department was on routine patrol and noticed a car speed up as it approached a yellow light. The light turned red but the vehicle continued and made a left turn. Zacharias stopped the vehicle and identified the defendant, Jeremy Pitz, as the driver. Zacharias noticed Pitz's eyes were watery and bloodshot. Pitz admitted that he had just had a beer with a friend. Results of field sobriety tests and two preliminary breath tests indicated Pitz was intoxicated. The officer discovered a half-empty beer can in the console of the car and five empty beer cans in the back seat. Pitz was arrested for operating while intoxicated and taken to the police department for implied consent procedures. Pitz supplied a breath sample to be analyzed by the DataMaster cdm testing device, which indicated a blood alcohol level of 0.109.

Pitz was prosecuted for operating while intoxicated as a second offender in violation of Iowa Code section 321J.2 (2003 Supp.). Pitz filed a motion to suppress the results from the DataMaster cdm device and any testimonial evidence relating to the breath test. Pitz alleged the results and testimony drawn from the results were inadmissible because statutory foundational requirements had not been established and because various flaws in the certification and calibration of Datamaster machines made the results unreliable. After a hearing, the motion was denied but Pitz renewed objections on these grounds throughout trial. Pitz also objected to a DCI criminalist's testimony estimating from Pitz's size and breath test result, the number of drinks Pitz consumed and his possible level of impairment. Before the case was submitted to the jury, Pitz objected to certain language in two of the jury instructions, claiming it unduly influenced the jury by detracting from the State's burden of proof. The court overruled the objection and the jury returned a guilty verdict. Pitz appeals these adverse rulings. He also claims, for the first time, that Iowa Code section 321J.15, which provides foundational requirements for admission of breath tests, is unconstitutional.

II. STANDARD OF REVIEW.

Our review of a court's interpretation of statutory and administrative requirements that govern the admissibility of evidence is for correction of errors at law. *State v. Stohr*, 730 N.W.2d 674, 675-76 (applying this standard when determining whether court correctly applied the foundation requirements of section 321J.15). Issues concerning the admission of expert testimony are

reviewed for abuse of discretion. *State v. Rains*, 574 N.W.2d 904, 916 (Iowa 1998). “Our standard of review on issues of jury instructions is for errors at law.” *State v. Anderson*, 636 N.W.2d 26, 30 (Iowa 2001).

III. ADMISSION OF BREATH TEST.

Pitz initially argues that the court erred in admitting the breath test results taken with the DataMaster device. He claims the State failed to lay adequate foundation to permit the admission of the breath test results. He contends the State must prove the DataMaster provides reliable results prior to admission. Pitz claims the DataMaster results are not reliable and should not be admitted due to various flaws including:

- (1) the DCI criminalist’s admission that he did not know if the DataMaster reading accurately reflected Pitz’s breath alcohol level.
- (2) The DCI criminalist’s admission that only one breath sample is used but multiple samples may show a variance of up to .05 in breath alcohol level.
- (3) The DataMaster is not adjusted to actual human breath temperature which can also affect the result.
- (4) The DCI does not calculate a margin of error for each individual machine when calibrating and certifying the machine.
- (5) The DCI does not use statistical analysis in determining the margin of error of $\pm 5\%$.
- (6) The testing and calibration procedures do not account for variations caused by temperature, air pressure, radio interference, or by the presence of acetones and ketones which may skew the results.
- (7) In the calibration process, the DCI programs the machine to read a standardized solution sample at a .100 level without first having the machine test and analyze the actual level of the sample.
- (8) Failure to assure the DataMaster machines are connected to a dedicated outlet and the breath hose is free of dust and other non-alcohol hydrocarbons may also skew results.

The State contends the DataMaster calibration and testing methods are reliable, and in any case, any potential flaws Pitz identifies impact the weight rather than the admissibility of the breath test result.

Iowa Code section 321J.15 governs the admissibility of breath test results. It allows admission of “evidence of the alcohol concentration . . . at the time of the act alleged as shown by a chemical analysis of the person’s . . . breath.” Iowa Code § 321J.15. The statute sets forth what foundation is needed prior to admission of the test results.

If it is established at trial that an analysis of a breath specimen was performed by a certified operator using a device intended to determine alcohol concentration and methods approved by the commissioner of public safety, no further foundation is necessary for introduction of the evidence.

Id. The Supreme Court has previously interpreted the foundational requirements demanded by the statute. *Stohr*, 730 N.W.2d at 676; *State v. Bechtel*, 434 N.W.2d 892, 894 (Iowa Ct. App. 1988).

Under section 321J.15, the State must establish three elements: (1) the test was performed on a device intended to determine alcohol concentration, (2) the test was performed by an operator certified to use the device, and (3) the methods used to perform the test were approved by the Commissioner of Public Safety.

Stohr, 730 N.W.2d at 676. The first element is satisfied because the DataMaster cdm is a device intended to determine alcohol concentration and is approved by the Commissioner of Public Safety to be employed in determining alcohol concentration for evidentiary purposes. Iowa Admin. Code. R. 661-157.2(3). The second element was met when the State provided adequate proof that officer Zacharias performed the test and is certified to operate the machine. At

trial Zacharias testified that he was certified. Also, the State submitted a report bearing Zacharias's signature, confirming that he was certified and had read updated training materials for operating the Datamaster cdm. Last, the State also established that the testing procedures approved by the Commissioner of Public Safety were followed by Zacharias. By supplying recent certifications of the instrument, the State proved the actual machine used had been recently certified by the DCI and was in proper working order under the administrative rules. The State also provided the operational checklist that officer Zacharias used and initialed while testing Pitz.

Pitz contends more foundation proving the reliability of the machine is required. The Supreme Court has held otherwise. *See Stohr*, 730 N.W.2d at 676 (rejecting the argument that "our general rule for admission of scientific evidence must be superimposed on the statutory criteria of section 321J.15"). The flaws Pitz identifies do not affect the admissibility of the test results but can be used to convince the fact finder that the results may not be accurate. "If a defendant . . . chooses to attack the results of a breath test, the jury may consider his argument in assessing the weight to give the test results." *Id.* Since the statutory foundational requirements were met, the district court correctly admitted the breath test results.

IV. VALIDITY OF IOWA CODE SECTION 321J.15.

Pitz alternatively contends Iowa Code section 321J.15, as recently construed in *State v. Stohr*, 730 N.W.2d 674 (Iowa 2007), is unconstitutional. He argues that the statutory process for admitting scientific evidence in operating

while intoxicated cases violates Pitz's due process rights and separation of power principles. The State contends that Pitz has not preserved error on this issue while Pitz claims he could not have raised the issue prior to the release of the *Stohr* decision.

"Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal." *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997). "A party challenging a statute on constitutional grounds must do so at the earliest available time in the progress of the case." *Id.* In *Stohr*, the Supreme Court held that Iowa Code section 321J.15 contains all foundational requirements for admission of breath test results and the court need not apply additional foundational requirements for admitting scientific evidence. *Stohr*, 730 N.W.2d at 676. Pitz argues that before the *Stohr* decision, under *State v. Stratemeier*, 672 N.W.2d 817 (Iowa 2003), the trial court had discretion to review the reliability of the scientific evidence prior to admission. Pitz concludes that he could not have raised these constitutional issues before this discretion was usurped.

We conclude error was not preserved on this issue. The statutory foundational requirements for admission of breath test results have been disputed repeatedly. See *Stratemeier*, 672 N.W.2d at 821; *State v. Hornik*, 672 N.W.2d 836, 839-42 (Iowa 2003); *Bechtel*, 434 N.W.2d at 893-94. Pitz could have raised these constitutional issues prior to appeal. We fail to see how the *Stohr* decision precluded raising the claims previously. Since error was not

preserved on these claims, we cannot review them. See *McCright*, 569 N.W.2d at 608.

V. CRIMINALIST TESTIMONY.

Pitz next claims the court permitted a DCI criminalist to provide expert opinion in areas outside of his expertise. “The general rule in this jurisdiction is one of liberality in the admission of opinion evidence.” *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). We only reverse when there is a clear abuse of discretion. *Id.* The defendant must also be prejudiced by the testimony. *State v. Brown*, 470 N.W.2d 30, 32 (Iowa 1991). The rules of evidence permit expert testimony if it will be helpful to the jury.

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. “The evidence will be admitted, however, only if it is shown to be reliable ‘because unreliable evidence cannot assist a trier of fact.’” *Brown*, 470 N.W.2d at 32 (quoting *State v. Klindt*, 389 N.W.2d 670, 672 (Iowa 1986)). The facts or data an expert relies on in forming an opinion need not be admissible evidence if those facts and data are “of a type reasonably relied upon by experts in the particular field.” Iowa R. Evid. 5.703. An expert can also provide an opinion even though it addresses an issue that must ultimately be decided by the jury. Iowa R. Evid. 5.704.

There is a statutory presumption that criminalists are qualified to provide expert testimony. Iowa Code section 691.2 provides in part,

It shall be presumed that any employee or technician of the criminalistics laboratory is qualified or possesses the required expertise to accomplish any analysis, comparison, or identification done by the employee in the course of the employee's employment in the criminalistics laboratory. Any report, or . . . findings of the criminalistics laboratory shall be received in evidence, if determined to be relevant, in any court . . . in the same manner and with the same force and effect as if the employee . . . who accomplished the requested analysis . . . had testified in person.

Iowa Code § 691.2.

At trial, Mr. James Bleskacek, a criminalist for the Iowa Division of Criminal Investigation, testified. Bleskacek has a degree in chemistry and works in the blood and breath alcohol sections of the criminalistic laboratory. He performs blood alcohol analysis of samples sent to the lab and is one of three criminalists who travel throughout the state to calibrate and certify the DataMaster cdm machines. He fixes the machines when they are not working and trains officers on how to properly operate the DataMaster cdm devices. He has been to numerous training courses on the DataMaster machine and has attended a one-week course on alcohol issues in litigation. Pitz sought to limit Bleskacek's expert testimony to discussion of alcohol content in breath analysis and the DataMaster machine. The court qualified Bleskacek as an expert in these areas but refused to certify him as an expert in the field of toxicology.

The court permitted Bleskacek to testify, over Pitz's objection on lack of foundation, about formulas the DCI laboratory and other agencies rely on to estimate the number of drinks consumed based on characteristics of a subject and a breath test result. Bleskacek admitted that there are multiple factors in the formulas and they are difficult to explain. However, Bleskacek testified that he

and the other members of the lab rely on the formula and use it regularly. The court then permitted Bleskacek to extrapolate with the formula, the number of drinks someone may have consumed with characteristics and a breath test result similar to Pitz. Bleskacek was also allowed to testify over objection about whether, in his opinion, someone with a .109 breath alcohol result would be impaired.

We do not find any abuse of discretion in these rulings. The court only permitted extrapolations from the formula after it was established that persons in this field and DCI staff rely on the formula. This is all that is required under rule 5.703. We also do not find the court abused its discretion in permitting Bleskacek to provide his opinion as to whether impairment would exist at a certain breath alcohol level. Bleskacek is a criminalist who has received specialized training on alcohol testing and breath test results. Bleskacek did not express an opinion as to guilt or innocence but merely expressed an opinion about intoxication based on his training. *Compare State v. Murphy*, 451 N.W.2d 154, 155-56 (Iowa 1990) (permitting arresting officer to provide opinion about defendant's intoxication due to personal observation of defendant and officer's specialized training) with *State v. Maurer*, 409 N.W.2d 196, 197-98 (Iowa 1987) (reversing conviction for operating while intoxicated when officer testified that in his opinion the defendant was under the influence "beyond any reasonable doubt" because the jury must decide whether the standard of proof has been met).

VI. JURY INSTRUCTIONS.

Pitz argues the court erred by instructing the jury twice that it did not have to unanimously agree on a theory or factual basis supporting a verdict. He contends the repetition of this instruction “deemphasizes the need to look at each theory, and each set of facts, to see if there is proof beyond a reasonable doubt as to each theory” and “pressures each juror to be less independent.” The State argues the instructions are not identical, are based on Iowa’s uniform criminal jury instructions, and Pitz was not prejudiced by any repetition in the instructions.

Instruction 13 stated in part:

The State must prove both of the following elements of Operating While Intoxicated:

1. On or about the 15th day of June, 2004, the defendant operated a motor vehicle.
2. A[t] that time, the defendant either: (a) was under the influence of alcohol, or (b) had an alcohol concentration of .08 or more.

(It is not necessary for all jurors to agree to just (a) or (b). It is only necessary that all jurors agree to at least one of these two alternatives.)

If the State has proved both of the elements, the defendant is guilty. If the State has failed to prove either of the elements, the defendant is not guilty.

Instruction 18 provided general instructions to the jury. It provided in part:

In order to return a verdict, each juror must agree to it. Your verdict must be unanimous.

Where two or more alternative theories are presented, or where two or more facts would produce, the same result, the law does not require each juror to agree as to which theory or fact leads to his or her verdict. It is the verdict itself which must be unanimous, not the theory or facts upon which it is based.

It is your duty as jurors to consult with one another and reach an agreement, if you can do so without compromising your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with the other jurors.

During your deliberations, do not hesitate to re-examine your view and change your opinion if convinced it is wrong. But do not change your opinion as to the weight or effect of the evidence just because it is the opinion of other jurors, or for the mere purpose of returning a verdict.

“Error in giving a jury instruction does not merit reversal unless it results in prejudice to the defendant.” *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004). “Prejudice results when the trial court’s instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized.” *Anderson v. Webster City Comty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000). We also consider the instructions as a whole rather than in isolation. *Id.* We are more reluctant to disapprove of uniform instructions. *State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994).

In reviewing the instructions as a whole, we find Pitz was not prejudiced by the instructions because they did not unduly emphasize the need to reach a verdict unanimously or discourage jurors from exercising independent judgment. The two instructions are not identical. Instruction 13 explains the elements the State had to prove and the specific alternative theories the jurors could consider in determining whether Pitz operated a vehicle while intoxicated. Instruction 18 provides guidance to the jurors about their duties. It advises them in general terms that the verdict must be unanimous but they need not agree on the specific facts. The instruction advises jurors to consider the case independently. The two instructions are not unduly repetitive or superfluous. There was no error in submitting these instructions to the jury.

We conclude the district court properly admitted the breath test results and did not abuse its discretion in permitting the DCI criminalist to provide expert opinion testimony. There was no error in the jury instructions. We therefore affirm defendant's conviction.

AFFIRMED.