IN THE COURT OF APPEALS OF IOWA

No. 8-229 / 07-0796
Filed June 25, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NATHAN CHARLES BALLOU,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Christine Dalton (trial) and Douglas McDonald (sentencing), District Associate Judges.

Nathan Ballou appeals his conviction for third-offense operating while intoxicated. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael J. Walton, County Attorney, and Alan Haverkamp, Assistant County Attorney, for appellee.

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

ZIMMER, J.

Nathan Ballou appeals his conviction for third-offense operating while intoxicated in violation of Iowa Code section 321J.2(1) (2005). Ballou contends the district court erred in admitting irrelevant evidence over an objection by his counsel during redirect examination of one of the State's witnesses. Ballou also contends the district court erred in imposing an illegal sentence. We affirm.

I. Background Facts and Proceedings.

On October 22, 2006, Officer Craig Stone was providing security as part of a second job at an establishment in Davenport. As he was driving home from that job around 2:30 a.m., he noticed an on-coming car in the opposite lane of traffic on Division Street. As the car approached, it drifted toward the middle of the road, eventually crossing the center line. Officer Stone had to swerve to avoid a collision.

Meanwhile, Officer Brian Stevens was on routine patrol near the intersection of Locust and Division Streets when he heard the sound of screeching tires. Officer Stevens turned in the direction of the sound and saw a car spinning out of control. He heard a crash and saw barricades in front of a construction site fly into the air. Officer Stevens drove to the crash site and found the driver sitting in his car where it had come to rest. After the driver got out of the car, Officer Stevens asked him for his license, registration, and proof of insurance. The officer identified the driver as Nathan Ballou.

A short time later, Officer Stone heard a radio report indicating a crash had just occurred not far from the location of his near collision on Division Street. The description of the vehicle on the broadcast matched the description of the

car that nearly collided with Officer Stone's car a few minutes earlier. After hearing the radio report, Officer Stone immediately called Officer Stevens to provide him with additional information about his near collision with the same vehicle.

After Ballou exited his vehicle, Officer Stevens observed that Ballou had bloodshot and watery eyes, slurred speech, unsteady balance, and a powerful, overwhelming smell of alcohol coming from his breath. Officer Stevens asked Ballou to perform field sobriety tests, but Ballou refused. Ballou admitted to drinking a "couple of beers." Despite the fact that no one else was present at the crash scene, Ballou denied he was the driver of the vehicle. Officer Stevens took Ballou into custody and transported him to the Bettendorf Police Department. Once at the station, Officer Stevens read Ballou the implied consent advisory. Ballou refused to provide a breath specimen for testing. He was arrested for operating while intoxicated and was transported to the Scott County jail.

On November 7, 2006, the State charged Ballou with third-offense operating while intoxicated in violation of Iowa Code section 321J.2(1) and driving while his license was denied or revoked in violation of section 321J.21. On November 15 Ballou filed a written arraignment and plea of not guilty.

Prior to his trial, Ballou advised the court that he wished to plead guilty to driving while license was revoked and a number of accompanying simple misdemeanors. The court then asked Ballou if he was stipulating that he had two prior convictions for operating while intoxicated for purposes of sentencing enhancement if he was convicted. Ballou admitted he had been convicted of operating while intoxicated twice before. The court found Ballou's admissions

sufficient to enhance his sentence in the event the jury returned a guilty verdict on the underlying operating while intoxicated charge.

On March 12, 2007, a jury found Ballou guilty of operating while intoxicated. Ballou appeared for sentencing on April 27, 2007. After confirming Ballou had previously conceded that he had two prior convictions, the court sentenced Ballou for operating while intoxicated as a third offender. Ballou appeals.

II. Scope and Standards of Review.

We review evidentiary matters for abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). In order to prove the district court abused its discretion, Ballou must show the court exercised its discretion on clearly untenable grounds or unreasonably. *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976). "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." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

III. Discussion.

A. Relevancy Ruling.

Generally, relevant evidence is admissible and irrelevant evidence in not admissible. Iowa R. Evid. 5.402. Relevant evidence is 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." Iowa R. Evid. 5.401. Even when evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403.

Ballou asserts that redirect examination concerning whether it was typical for drunken drivers to admit to drinking a couple of beers was irrelevant. The following exchange took place during Officer Steven's redirect examination:

> Q. Have you routinely made a lot of operation while under the influence arrests, officer? A. Yes, I've made quite a few.
> Q. And do you normally ask the people you stop how much they had do drink? A. Yes.
> Q. And of those what would say is the number one answer to that?
> MR. BELL: I'm going to object. What anyone else in the world answers is irrelevant to my client.
> MR. GELLERMAN: He went into experience in spinning wheels.
> THE COURT: I'll allow the question. You can answer the question.
> THE WITNESS: What is the question?
> Q. The question is, what is the number one answer that you receive when people tell you how much they've had to drink? A. It's usually a couple of beers or two or three beers. Two or three drinks is what they usually say.
> Q. And would you say that that's the majority? Over fifty-percent or under fifty-percent?
> MR. BELL: Your Honor, I'm going to object again. It's not relevant what everybody else answers. We aren't doing this on a statistical basis.
> THE COURT: Right. I'm going to go ahead and allow the question. Don't go too much further, Mr. Gellerman, you – you're on the bridge of irrelevant, quite frankly.
> THE WITNESS: I would say it's at least half would say that, probably more.

Ballou argues it was irrelevant what others might admit in a similar situation. Even if we assume it was error for the district court to allow the officer to testify to what other drivers say in similar circumstances, and to testify regarding the percentage of intoxicated suspects who admit to consuming a couple of drinks, we conclude Ballou is not entitled to relief on appeal. We reach this conclusion because we determine that any error which occurred did not result in the type of prejudice sufficient to justify a reversal of Ballou's conviction.

State v. Parker, 747 N.W.2d 196, 209 (Iowa 2008) (explaining that in order to reverse the court's ruling when a nonconstitutional error is claimed, it must be determined that the rights of the defendant have been injuriously affected by the error or that the defendant has suffered a miscarriage of justice).

The record in this case reveals Ballou was driving a vehicle in an erratic manner without a driver's license. Ultimately, he lost total control of his vehicle. Officer Stevens arrived at the scene of the accident and found Ballou alone in his car. Although there was no one else present, Ballou asserted someone else had been driving. Ballou's speech at the scene was slurred, and he had a strong odor of alcoholic beverage on him. *See State v. Benson*, 506 N.W.2d 475, 477 (Iowa Ct. App. 1993) (finding slurred speech is evidence of being under the influence); *State v. Harris*, 490 N.W.2d 561, 563 (Iowa 1992) (finding alcohol on one's breath is a factor in determining whether one is under the influence of alcohol). Additionally, the defendant admitted he had been drinking before he crashed his car. Because the overall evidence was very strong that Ballou had been driving while under the influence, we conclude the testimony by Officer Stevens on redirect examination did not prejudice the defendant's rights.

B. Illegal Sentence.

Following his conviction, Ballou was sentenced as a third offender. Ballou now contends his sentence is illegal because the court's questioning of him regarding his prior convictions was inadequate.[1] He claims the record fails to

[1] In this case, the record reveals there was a pretrial conference where Ballou was present with his lawyer and Ballou agreed he would stipulate to two prior offenses. At the time of trial, the court confirmed with Ballou that he still intended to abide by that stipulation. The court confirmed with Ballou that he had two prior convictions for

demonstrate that his admissions were either voluntary or intelligent, and the court failed to address the question of whether he was represented by counsel during the proceedings that resulted in the prior convictions. *See* Iowa R. Crim. P. 2.19(9).[2]

The State claims Ballou failed to preserve error in challenging his sentence. Upon review of the record, we agree that error was not preserved. Although we may correct an illegal sentence at any time, "a defective sentencing procedure does not constitute an illegal sentence" under Iowa Rule of Criminal Procedure 2.24(5)(*a*).[3] *Tindell v. State*, 629 N.W.2d 357, 359-60 (Iowa 2001). While Ballou's challenge asserts that the court's colloquy with him was not

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operating while intoxicated in Iowa, one in 2000 and one in 2005. Ballou's responses indicated he recalled both of these convictions and he wished to stipulate to their existence. The court informed Ballou that based upon the stipulation she would find the existence of those convictions beyond a reasonable doubt if he were convicted of the current offense

[2] Iowa R. Crim. P. 2.19(9) states:

> *Trial of questions involving prior convictions.* 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. If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted. Other objections shall be heard and determined by the court, and these other objections shall be asserted prior to trial of the substantive offense in the manner presented in rule 2.11. On the issue of identity, the court may in its discretion reconvene the jury which heard the current offense or dismiss that jury and submit the issue to another jury to be later impaneled. If the offender is found by the jury to be the person previously convicted, or if the offender acknowledged being such person, the offender shall be sentenced as prescribed in the Code.

[3] Iowa R. Crim. P. 2.24(5)(*a*) states, "The court may correct an illegal sentence at any time."

adequate, he does not claim his sentence is in excess of that authorized by law and thus outside the jurisdiction of the court to impose.[4] *See id.* at 360. We conclude his claim of procedural error is not a claim of illegal sentence, and therefore, it is precluded from review on appeal by our normal error-preservation rules. *See State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) ("Generally, issues not raised in the trial court may not be raised for the first time on appeal.").

IV. Conclusion.

We conclude the testimony by Officer Stevens on redirect examination did not prejudice the rights of Ballou. We further conclude the defendant has not preserved error on his claim that his sentence was illegal. Accordingly, we affirm the district court.

AFFIRMED.

[4] In addition, Ballou makes no claim that his two prior convictions would not support the enhanced sentence he received, and he makes no claim that he received ineffective assistance of counsel.