IN THE COURT OF APPEALS OF IOWA

No. 9-520 / 08-0513
Filed October 7, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN QUINCY ADAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Defendant appeals his convictions for homicide by vehicle, operating while intoxicated, and leaving the scene of an accident. **AFFIRMED IN PART AND VACATED IN PART; REMANDED FOR RESENTENCING.**

Alfredo Parrish of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., Mansfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MANSFIELD, J.

Following a jury trial, Jonathan Adams was convicted of homicide by vehicle in violation of Iowa Code section 707.6A(1) (2007), operating a motor vehicle while under the influence of alcohol (OWI) in violation of section 321J.2, and failure to give information and aid and leaving the scene of an accident, in violation of sections 321.261(3) and 321.263. On appeal, Adams claims there was insufficient evidence to support a finding that he was under the influence of alcohol at the time of the accident. Adams also alleges errors in denying his motion for new trial, in admitting certain expert testimony, and in being denied the effective assistance of counsel. Finally, Adams argues that his OWI conviction merged into his homicide-by-vehicle conviction, of which it was a lesser-included offense. For the reasons set forth herein, we agree only with Adams's final contention, and otherwise affirm.

I. Facts and Prior Proceedings

At approximately 10:45 p.m. on Friday, December 8, 2006, a vehicle operated by Jonathan Adams struck a bicycle ridden by Tina Marie Brown in the westbound lane of Park Avenue in Des Moines. Brown died as a result of the injuries she received in the accident.

On the day of the accident, Jodi Woods, a friend of Jonathan Adams, hosted a party at her house in Des Moines. The party started at approximately 8:30 a.m. The party had chips and snack trays for everyone, but guests were to bring their own beverages. People came and went throughout the day, and it was estimated that somewhere between fifteen and thirty people attended the party.

Although Adams at that time was working in Omaha, he lived in Des Moines. Adams initially arrived at Woods's party in the mid-afternoon after he got off his early morning work shift in Omaha. However, he did not stay very long or drink any alcohol because he wanted to return to his apartment to shower and change out of his work clothes.

At approximately 5:00 p.m., Sean Erickson, a friend who lived in the same apartment complex as Adams, came to Adams's apartment to get a ride to Woods's party. Adams and Erickson soon left for the party, but they decided to pick up some beer en route at a local gas station. Adams purchased a twelve-pack of Budweiser cans, while Erickson purchased a twenty-pack of Budweiser bottles. These transactions were recorded on the store's surveillance video, which was shown to the jury.

Upon arriving at the party between 5:30 and 5:45 p.m., Adams placed his beer into the refrigerator and spent several hours talking to guests in the kitchen. During trial nine witnesses were called to testify as to their interaction with Adams while at the party, mainly on the subject of whether Adams appeared intoxicated.

Jodi Woods, the host, admitted she was intoxicated. She testified that she did not even remember Adams and Erickson showing up at the party.

Erickson testified that he got "pretty drunk" at the party and that he was still "intoxicated" when he and Adams left the party later that evening. Although Erickson denied to some extent that Adams was intoxicated, he also confirmed his prior deposition testimony that "[he] wouldn't say [Adams] was sober" while at the party. Erickson also acknowledged having told his cousin after the accident

that both he (Erickson) and Adams were intoxicated. Erickson testified that he could have consumed some of Adams's beer, and vice versa.

Andrew Mattes, a guest, testified that Adams "came off as a little bit arrogant" and "obnoxious" at the party. He also stated that Adams had a beer in his hand at the party, but he did not know if he was drunk.

Jennifer Mattes, Andrew's wife, also spent time in the kitchen talking to Adams. She testified that Adams was "loud and obnoxious" and that "the entire time [she] saw him he had a can of beer or a bottle of beer in his hand." However, she did not see enough of Adams to form a judgment whether he was intoxicated, although she did not believe that Adams was intoxicated.

Matthew Montgomery, another guest, spent a majority of his time at the party in the garage and living room, where the kitchen is not visible. However, Montgomery did interact with Adams on one occasion when Adams made fun of Montgomery's Philadelphia Eagles sport jacket. Adams is a Pittsburgh Steelers fan. Montgomery testified that he thought Adams was "a little unsteady on his feet. His speech seemed to be a little bit slurred." Montgomery also noted that Adams rocked back and forth and was wobbly, that Adams "was kind of aggressive, and he was kind of belittling some people." Montgomery further testified that he thought Adams was too intoxicated to drive home. Montgomery did admit he had used marijuana twice that evening.

Chad Adams, Jonathan Adams's brother, testified that his brother was drinking but did not appear intoxicated. Also, Chad Adams's wife, Michelle Mullica, testified she spoke with Jonathan Adams while at the party and did not

believe he was intoxicated. Jose Padilla testified that Jonathan Adams did not appear intoxicated although he had a beer in his hand.

Christopher Dow, a school teacher and a friend of Adams, testified that he arrived at the party at 10:00 p.m., shortly before Adams left. At the time of his arrival, Dow believed that Adams was not intoxicated.

Adams, who took the stand in his own defense, claimed that he "opened" three or four cans of beer and "sipped" them during the evening. He testified that others consumed some of the beer he had brought. Adams also admitted that he opened a bottle of Budweiser. He denied that he was under the influence of alcohol when he left the party.

At around 10:45 p.m., Adams and Erickson decided to go home in Adams's car. It is undisputed that the right front headlight on Adams's car, a Chevrolet Monte Carlo, was not operating. Adams drove while Erickson sat in the passenger seat.[1] When they left, Adams and Erickson had four cans (out of an original twelve) and two bottles (out of an original twenty) of beer remaining. These were placed in the backseat of the car. Adams testified that as he was proceeding west on Park Avenue, he took his eyes off the road to change the satellite radio station in his car. At that time, his vehicle struck Brown who was riding her bicycle in the same westbound direction near the curb. Brown was thrust onto the hood of the vehicle and her head slammed into the windshield collapsing it inward. Brown's body then rolled to the right, broke the passenger side mirror and came to rest 86.4 feet from the initial collision point. As a result of this collision, Brown suffered skull fractures that caused her death.

[1] Erickson did not have a valid driver's license at the time because of an OWI conviction.

Erickson and Adams each told a different story about what happened after the collision. Erickson testified that he did not know what the car had hit, but when they were stopped at a red light a block after the collision, he turned and asked Adams what had happened. Adams then responded, "Shut the f--- up and let me think for a minute." After that, Adams proceeded to drive to the apartment complex.

Adams disputed Erickson's version. He testified that after the collision he immediately turned to Erickson and asked him what they had hit. According to Adams, Erickson answered that he thought they had hit a trash can. Adams went on to testify that as they approached the red light at the intersection it turned green so he proceeded through it, still confused and trying to figure out what had just happened. Adams also stated that when they parked at the apartment complex, Erickson finally stated that maybe they had hit a bike, to which Adams responded that it could not have been a bike at this time of night in December.

After arriving at the apartment complex, Adams and Erickson retired to their respective apartments. Adams called his brother Chad to talk about what had just happened. According to their testimony, Chad attempted to calm Adams by reassuring him that he could not have struck a bicycle; it must have been just a trash can.

At no point during that night did Adams or Erickson contact the police. Rather, around 11:00 p.m., another motorist discovered Brown's body in the road. He made an emergency 911 call, and Brown was pronounced dead at the scene. The Des Moines police immediately began an investigation. During

Saturday, December 9, the police canvassed local parking lots and advised local media outlets that they were looking for a red-colored vehicle with extensive front end damage.

The following morning, Sunday, December 10, Chad saw the news reports of the incident and called Adams. Later that afternoon, Adams had his mother take him to Wal-Mart where he purchased a car tarp to cover his vehicle.

Police continued to investigate the accident, but neither Adams nor Erickson contacted the police. Eventually, on Sunday night, Erickson telephoned a cousin in Texas and told him that both he and Adams had been intoxicated and that they had hit and killed a woman. The cousin contacted the police, who immediately went to the apartment complex to talk to Adams and Erickson. Neither were home at the time, but the police did discover the car under the tarp.

On Monday, December 11, 2006, Adams contacted an attorney and turned himself in. Adams was eventually charged by trial information with homicide by vehicle, OWI, and leaving the scene of an accident. A jury trial was held from December 12 through December 18, 2007, and Adams was found guilty on all charges. Motions for arrest of judgment and new trial were denied, and the court sentenced Adams to twenty-five years imprisonment for homicide by vehicle, one year for OWI, and two years for leaving the scene of an accident, all sentences to run concurrently. Adams is required to serve at least seven-tenths of his twenty-five year sentence. *See* Iowa Code § 902.12(6).

II. Sufficiency of the Evidence

Adams contends there was insufficient evidence to support a finding that he was "under the influence" of alcohol at the time he operated his motor vehicle, as required for the convictions for homicide by vehicle and OWI.[2]

We review sufficiency of the evidence challenges for correction of errors at law and will uphold the jury's verdict if supported by substantial evidence. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). Substantial evidence is evidence that would "convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *Id*. In making this determination, we consider all the evidence, not just the evidence supporting the verdict. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record. *Id*.

At trial, the State must prove every element of the crime charged beyond a reasonable doubt. *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976). The State's evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981). In weighing the evidence, direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(*p*).

With a hit-and-run driver who is not apprehended soon after the accident, proof that the person was "under the influence" at the time of the accident is made more difficult. This is because alcohol dissipates in the body over time,

[2] The elements "while intoxicated" in Iowa Code section 707.6A(1) and "[w]hile under the influence of an alcoholic beverage" in section 321J.2(1)(a) are synonymous. *See State v. Davis*, 196 N.W.2d 885, 890 (Iowa 1972).

rendering direct sources of evidence like blood-alcohol-content tests and field sobriety tests futile. However, many sources of evidence can still support the conclusion that an individual was "under the influence." A person can be shown to be "under the influence" when the consumption of alcohol affects the person's reasoning or mental ability, impairs a person's judgment, visibly excites a person's emotions, or causes a person to lose control of bodily actions. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). In this regard, conduct and demeanor are important considerations. *State v. Price*, 692 N.W.2d 1, 3 (Iowa 2005). Certain conduct, such as leaving the scene of an accident and concealment of the vehicle following the accident, may be evidence of the person's impaired judgment. *State v. Walker*, 499 N.W.2d 323, 325 (Iowa Ct. App. 1993). In addition, a person's manner of driving is another relevant source in determining whether the person was "under the influence." *See State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992).

When reviewing the evidence in the light most favorable to the State, we conclude there is substantial evidence that Adams was "under the influence" at the time his vehicle stuck Brown. Adams and his friend Erickson arrived at the party with thirty-two cans/bottles of beer and left with six. Adams himself admitted to consuming approximately three or four cans and one bottle at the party, a quantity that the jury could find was an understatement. Adams was observed with beer in his hand throughout the night while at the party. Two witnesses, Erickson and Montgomery, testified that Adams was intoxicated. Although Adams notes they were both impaired that evening, this does not mean

a jury had to disbelieve their testimony.[3] Furthermore, the witnesses on whose testimony Adams principally relies were his own friends and relatives. Additionally, some of those witnesses acknowledged to having OWI convictions themselves, and thus a jury was entitled to conclude they might not be the best judges of when a person is too intoxicated to drive. In short, we believe the jury was allowed to weigh the credibility of each witness and apparently did so. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive.").

The circumstances of the accident are also strong evidence that Adams was impaired. It is difficult to describe in a judicial opinion the impression conveyed by the post-accident photographs of Adams' vehicle. The windshield, where Brown's head and body hit the car, was smashed in, shattered, and collapsed into the front passenger seat. Yet Adams claimed not to have realized that he had hit someone. Adams' narration of the events to the jury was as follows:

> It's not a sound that happens. It's a gust of wind that happens and a shattering, the windshield had just shattered. And as I looked up Sean said, Dude, we just hit something. I said, No f------ s---, Sean, what was it? Because I wasn't looking out the window when this happened. The thing I got was the wind and this glass coming in on is what I got. So, No s---, Sean. I mean, I remember it to this day. No s---, Sean, what the f--- was that?
>
> Dude, I don't know, man it could have been anything. I think it was a trash can. This is as I'm going down Park Avenue coming

[3] The use of alcohol or drugs at or around the time of the events for which the witness is testifying bears on the witness's "capacity to observe, to remember or recount the matters testified about." *State v. Ivory*, 247 N.W.2d 198, 204 (Iowa 1976). Thus, it is a strong factor for the jury in weighing the witness's credibility. *Id*.

> up—Hy-Vee is right here, just coming up, and I mean within seconds . . . .

A jury was entitled to conclude that these were the perceptions of a person who was under the influence at the time.

Adams's conduct after the collision is also significant evidence of impaired judgment and consciousness of guilt. Adams did not stop at the scene of the accident. As he and Erickson approached a stop light at an intersection a block up the road, and Erickson asked him what had happened, Adams responded, "Shut the f--- up and let me think for a minute." Once the media reports of Brown's death surfaced, Adams purchased a tarp to conceal his car.

Adams argues there is no evidence that he was speeding, or was driving erratically, or tried to brake before, during, or after the accident.[4] In his view, this confirms his position that he was not under the influence and that he simply did not see Brown because he was changing radio stations at the time. Adams also notes that Brown was bicycling in the street late on a winter night and that the right headlight on his car was not working. Although this evidence may be consistent with a lack of intoxication, the existence of evidence which might support a different verdict does not negate the existence of substantial evidence sufficient to support the verdict. *See State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990). In this matter, substantial evidence existed to support the jury's verdict.

[4] The fact that Adams did not brake *after* the collision, when the windshield had collapsed into passenger compartment of the vehicle, could be evidence affirmatively pointing towards intoxication.

III. Motion for New Trial

Adams next asserts that the jury's verdict was contrary to the weight of the evidence and thus the district court erred in denying his motion for a new trial.

We review the denial of a motion for new trial for an abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). We do not reweigh the evidence, but instead examine whether the district court properly evaluated the motion for a new trial. *Id*. at 203.

Although trial courts have broad discretion in deciding motions for new trial, they must exercise this discretion carefully and sparingly so that the role of the jury as the principal trier of the facts is not lessened. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). A trial court should not disturb the jury's findings where the evidence it considered is "nearly balanced, or is such that different minds would naturally and fairly come to different conclusions." *Reeves*, 670 N.W.2d at 203. Only in the extraordinary case where the evidence preponderates heavily against the verdict such that a miscarriage of justice has occurred should a trial court grant a new trial. *Ellis*, 578 N.W.2d at 658-59.

The evidence proffered by Adams does not "preponderate heavily" against the verdict. *Id*. Therefore, we conclude the district court did not abuse its discretion in denying Adams's motion for a new trial.

IV. Admissibility of Dr. Schmunk's Testimony

At trial, the State called as a witness Dr. Gregory Schmunk, the Polk County Medical Examiner. After eliciting considerable testimony from Dr. Schmunk concerning Brown's injuries and the cause of her death, the State

then asked Dr. Schmunk to offer certain opinions about the effects of alcohol. This line of questioning culminated in the following exchange:

> Q. If an individual were described to you as being loud, arrogant, or obnoxious, commenting to someone that he just met a challenge or a comment about a sports team he was a fan of, exhibiting signs of slurred speech, unstable on his feet, rocking back and forth, wobbling, an individual who did not see a bike rider in front of him while operating a motor vehicle, would you be able to reach a conclusion as to whether or not that individual may be under the influence of alcohol? A. Yes.
>
> Q. In addition to those factors, if you were told an individual had been seen drinking alcohol, would that help in your conclusion? A. Yes.
>
> Q. And would those signs on an individual be consistent with being under the influence of alcohol? A. Yes, they would.
>
> Q. Assume that same hypothetical, but other than the person not seeing the bicycle, the individual saw the bicycle but was unable to swerve or stop. Would that still be consistent with a person, that individual, being under the influence? A. Yes.

Adams, who had filed an unsuccessful motion in limine to exclude this testimony, contends it "invaded the province of the jury and was an expert conclusion regarding [his] guilt."

On appeal, we afford the trial court wide latitude in its rulings on the admissibility of expert testimony, and reverse only if the court abused its discretion and the defendant was prejudiced. *State v. Belken*, 633 N.W.2d 786, 799 (Iowa 2001).

It is important to note that objections claiming evidence would "invade the province of the jury" are "'not valid or tenable if the opinion called for is about a matter which is a proper subject of expert testimony.'" *In re Detention of Palmer*, 691 N.W.2d 413, 418 (Iowa 2005) (quoting *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 344, 5 N.W.2d 646, 655 (1942)). The characteristics of an

intoxicated person are a proper subject of expert testimony. *See State v. Murphy*, 451 N.W.2d 154, 156 (Iowa 1990).

A witness qualified as an expert may state an opinion that "embraces an ultimate issue to be decided" by the jury; however, the witness may not express an opinion on the defendant's guilt or innocence. *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994); *see also* Iowa R. Evid. 5.704. In the past, we have acknowledged that "[a] fine line often exists between opinions which improperly express guilt or innocence . . . . and those which properly compare or characterize the defendant's conduct based on the facts of the case." *State v. Dinkins*, 553 N.W.2d 339, 341 (Iowa Ct. App. 1996). In *Dinkins*, we noted the fine line can arise in cases involving specific intent crimes, most notably where the fighting issue is whether the accused possessed drugs with the intent to sell. *Id*. In those cases, the average juror is normally unaware of the significance of certain circumstances, such as manner of packaging, the manner of secretion, and the presence of drug paraphernalia. *Id*. Thus, a typical juror might not appreciate how those facts fit into the question of whether the defendant intended to possess for personal use or for distribution. *Id*.

However, homicide by vehicle is not a specific intent crime. *See* Iowa Code § 707.6A(1) (the intent required is "unintentionally"). Furthermore, the average juror is normally aware of the significance of slurred speech, unsteady gait, and the loss of visual acuity in determining whether a person is under the influence of alcohol. Thus, it may be questionable for a prosecution expert to express an opinion as to whether certain facts fit the profile of a person who is intoxicated with alcohol. We have some concerns about the "helpfulness" of

such testimony as is required for its admissibility under Iowa Rule of Evidence 5.702.

Having said that, we do not believe the district court abused its discretion in admitting this testimony. *See State v. Rodriguez*, 636 N.W.2d 234, 245 (Iowa 2001). And even if it did, we do not think the rights of the defendant were "injuriously affected." *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004). Here, Adams's intoxication was the focal point of the trial. As discussed above, a large volume of evidence touched upon this issue. Dr. Schmunk's testimony was a small fish in a large pond. All he said was that some of the points brought out by the State were "consistent" with intoxication, a conclusion that we believe jurors could have easily reached themselves. On cross-examination, Adams's attorney was able to get Dr. Schmunk to acknowledge the flip side—namely that certain facts were also consistent with non-intoxication. Having reviewed the record, we believe the jury had the ability to sort through the intoxication issues itself based on the exhibits that were introduced, the testimony of numerous fact witnesses, and its own personal experience. We overrule this claim of error.

V. Testimony of Officer West

On redirect examination, the following exchange took place between the State and Officer West:

> Q. Have you had experiences where you found drivers of vehicle involved in accidents shortly after the accident that didn't remain at the scene? A. In my course of investigation where we do hit and run accidents and one party leaves the scene, it is generally an attempt to try and conceal or hide—
>
> MR. HAMROCK: Your Honor, at this time I'm going to object because what other people may do or may not do is not relevant to this trial in this case.

> THE COURT: Overruled. I will allow the witness to answer that.
>
> A. When doing accidents most people stay at the scene. They have nothing to hide. When one vehicle leaves, it may be because of impairment or the fact that they don't have a driver's license or insurance, but there is concealment that they don't want us to see when we arrive.

On appeal, Adams maintains that this testimony was irrelevant and prejudicial. We review its admissibility for abuse of discretion. *See Belken*, 633 N.W.2d at 799.

The State argues correctly that evidence of flight or concealment is relevant not only to show a person's impaired judgment, but also to show "a consciousness of guilt." *See Walker*, 499 N.W.2d at 335; *State v. Bone*, 429 N.W.2d 123, 126 (Iowa 1988). However, the issue is not whether evidence that Adams fled the scene is relevant, but whether a police officer should have been permitted to testify that when people flee the scene, they generally do so to conceal or hide something. With the benefit of twenty/twenty hindsight, we believe this line of questioning should not have been allowed.[5] This exchange between the prosecutor and the officer, in our view, should have been saved for closing argument than presented as testimony. *See State v. Marsh*, 392 N.W.2d 132, 134 (Iowa 1986) (stating inferences to be drawn from defendant's flight and concealment should be left to the jury as they consider all the evidence).

Having said that, we do not believe that Adams's rights were injuriously affected. Officer West's comment would have seemed self-evident to many jurors. The jury heard Adams's explanations for what he did after the accident

[5] We note also, however, that Officer West had largely answered the question before Adams's attorney objected.

and why. The jury also received testimony from Adams's passenger, Erickson, that was in several respects damaging to Adams. The jury saw the post-accident photographs of Adams's car, including the extensive damage and the tarp placed on the vehicle by Adams. We do not believe the above-quoted testimony would have played any meaningful role in the outcome of this case.

VI. Ineffective Assistance of Counsel

Adams also has claimed his trial counsel was ineffective for failing to make a proper motion for judgment of acquittal, failing to object to testimony from Officers West and Ouimet that questioned the credibility of other witnesses, and failing to object to comments made by the prosecutor during closing argument.

We review ineffective assistance of counsel claims de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). We conclude the record here is adequate to decide these issues.

To prevail, the defendant must demonstrate: (1) counsel failed to perform an essential duty and (2) the failure prejudiced the defendant. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish the first prong, the defendant "must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *Id*. To establish the second prong, a defendant must show a counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable probability exists that but for counsel's error the result of the proceeding would have

differed. *Id*. Defendant must prove both elements by a preponderance of the evidence. *Ledezma*, 626 N.W.2d at 142.

Adams first claims his counsel was ineffective for failing to articulate the precise test for judgment of acquittal. It appears that Adams is raising this claim as a precaution, in case we find that Adams did not preserve error on his sufficiency of the evidence arguments. We do not so find.[6] As noted above, we have reached the merits of this ground for appeal.

Adams next claims his counsel was ineffective for failing to object to testimony from Officers West and Ouimet that improperly attacked the credibility of other witnesses. It is well settled in Iowa that a bright-line rule prohibits the questioning of one witness as to whether another witness is telling the truth. *Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006).

Officers West and Ouimet each testified that during their investigation of the accident, they did not believe certain witnesses, including Sean Erickson and Jodi Wood, were "being open" and "coming forward with everything they knew." For example, Officer Ouimet testified:

> Q. When you talked to Jodi Wood, are you confident she told you everything she knows about her friend, Jon Adams? A. No, sir, I'm not.
>
> Q. When you talked to Sean Erickson, are you confident that he truthfully told you everything he knows about his friend, Jon Adams? A. Absolutely not, sir.

Officer West testified:

> Q. When you had your conversation with Mr. Erickson, you and Officer Ouimet, did he appear to be—or did you talk to him long enough to form an opinion whether he was being completely open

[6] The State also concedes in its brief that Adams preserved error on his sufficiency arguments.

> to you and other officers? A. In my opinion, he was being open to a certain point and then he would draw back.

This testimony needs to be viewed in context. It was elicited by the State on redirect. On *cross-examination* of these officers, Adams's counsel had made an effort to show that during the course of their investigation, they had interviewed both Erickson and Wood and neither witness had said Adams was intoxicated on the evening of December 8. Along the same vein, Adams's counsel tried to show that the officers were relying heavily on one witness, Montgomery, who had been using marijuana that evening, in lieu of considering the testimony of various other attendees at the party who did not say Adams was under the influence. Viewed against this backdrop, the officers' testimony was perhaps less of a stark, improper comment on credibility and more of a continuation of a previous theme initiated on cross-examination.

In any event, whether the testimony was objectionable or not, we are confident its absence would not have affected the outcome of the trial. Both Wood and Erickson later testified themselves at trial, and the jury had ample opportunity to form its own judgments concerning their credibility.

Adams next contends that his counsel was ineffective for failing to object to prosecutorial misconduct during closing argument. In order to show a due process violation based on prosecutorial misconduct, Adams must prove misconduct and prejudice to such an extent that he was denied a fair trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

In support of his claim of misconduct, Adams points to an isolated statement made by the prosecutor during closing argument: "It's not like [Brown]

was doing anything wrong here." Adams claims this characterization misstates the facts and was unfair because prior to trial, the State filed and was granted a motion in limine for evidence pertaining to alcohol and opiates in Brown at the time of her death. However, as we review the context, we agree with the State that the prosecutor was commenting not on Brown's possible intoxication, but on Brown's position in the roadway. The statement was made to refute the potential defense that Adams did not expect to see a person on a bike at that time of year or at that time of night. We find the statement was not misconduct and therefore insufficient to raise a meritorious due process claim.

VII. Merger

The parties agree that the trial court erred when it entered judgment on both the homicide by vehicle and OWI charges. *See State v. Pettyjohn*, 436 N.W.2d 65, 68 (Iowa 1988) (OWI is a lesser-included offense of homicide by vehicle). Therefore, we correct the error by vacating the OWI judgment and upholding the homicide by vehicle conviction. *See* Iowa Code § 701.9 (stating when an offense is a lesser-included offense of another, the court shall enter judgment of guilty of the greater of the offenses only). We remand to the district court for resentencing.

Since we are remanding for resentencing, we also ask the district court to consider a matter not raised on appeal by either party. The trial information charged Adams with failure to give information and aid and leaving the scene of an accident, where the accident resulted in death, in violation of Iowa Code sections 321.261(3) and 321.263. Prior to July 1, 2006, section 321.261(3) provided that a person who failed to stop or comply with the requirements of

section 321.261(3), in the event of an accident resulting in the death of a person, committed "an aggravated misdemeanor." Effective July 1, 2006, i.e., approximately five months before the events of this case, section 321.261 was amended. Subsection 3 now provides that an aggravated misdemeanor is committed if the accident resulted in serious injury, whereas a new subsection 4 provides that a class D felony is committed if the accident resulted in death. The jury instructions in this case contained the elements of what is now section 321.261(4). On remand, the district court should consider the impact of this apparent oversight on Adams's sentence. *See State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998) (noting that if a sentence is void, this can be addressed by the court even if not raised by either party).

AFFIRMED IN PART AND VACATED IN PART; REMANDED FOR RESENTENCING.