IN THE COURT OF APPEALS OF IOWA

No. 9-925 / 09-0379
Filed February 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN JAMES BARTLETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Kim M. Riley, District Associate Judge.

Defendant appeals his conviction for operating while intoxicated. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Randall J. Tilton, County Attorney, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.*

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

MAHAN, S.J.

I. Background Facts & Proceedings

On June 28, 2008, at about 4:00 in the afternoon, Linn Reese noticed a pickup truck about fifty feet out into a corn field. It was apparent the vehicle had missed a curve in the road. Reese approached the vehicle, and found the engine of the vehicle was still running. He saw a person sitting behind the steering wheel, with his eyes closed and head slumped down. Reese tapped on the window, banged on the door, and yelled trying to get a response, but was unsuccessful. Reese called the sheriff's department.

Deputy William Raum of the Hardin County Sheriff's Office responded to the call. On opening the door of the vehicle, he noticed the person inside, Steven Bartlett, had an odor of alcoholic beverages. Bartlett's eyes were bloodshot and watery. When he spoke, his speech was slow and slurred. Reserve deputy Diane Rash also noticed an odor of an alcoholic beverage, that Bartlett had glassy, bloodshot eyes, and was combative. She testified Bartlett stated he had spent the afternoon with his father and they had been drinking. The officers noticed Bartlett had urinated in his pants. Both Raum and Rush were of the opinion that Bartlett was under the influence of an alcoholic beverage.

After an ambulance arrived, Bartlett was placed on a backboard. He was combative with emergency personnel, stating there was nothing wrong with him and he wanted to go home. According to deputy Raum, at one point Bartlett attempted to sit up, then "wrenched in pain and flopped back down onto the

backboard and said, my back, my back, at which time the ambulance crew deemed he was not coherent enough to evaluate his own medical status." Bartlett suffered a fracture of the sixth vertebrae.

At the hospital, Deputy Raum advised Bartlett of the implied consent procedures under Iowa Code section 321J.6 (2007). Deputy Raum asked Bartlett to provide a blood sample. Bartlett said, "no, I refuse." Bartlett further refused to check on the implied consent form as to whether or not he consented, and also refused to sign the form. Deputy Raum did not request any other type of bodily samples.[1]

Bartlett was charged with operating while intoxicated, in violation of section 321J.2(1)(a). The case was tried to a jury. Bartlett testified he had no memory of drinking that day, and no memory of the accident. The jury found Bartlett guilty of operating while intoxicated. He was sentenced to forty-eight hours in jail, a fine, and required to attend a course for drinking drivers. Bartlett appeals his conviction.

II. Jury Instructions

Bartlett asserts the district court erred in overruling his objection to a jury instruction regarding his refusal to submit to a chemical test. We review issues relating to jury instructions for the correction of errors at law. *State v. Shearon*, 660 N.W.2d 52, 55 (Iowa 2003). We will not reverse unless prejudice results

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[1] Deputy Raum testified he did not request any other type of test because the Division of Criminal Investigation did not test urine for alcohol and he did not have access to a machine for testing Bartlett's breath at the hospital. The nearest breath-testing machine would have been about six or seven blocks away. Also, time was passing. Deputy Raum arrived at the scene of the accident at about 4:15 p.m. He stated he invoked implied consent a little after 6:00 p.m.

from an erroneous jury instruction. *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

Bartlett objected to an instruction which stated:

> The Defendant was asked to give a blood sample so it could be analyzed to determine the percent of alcohol in his blood. It is alleged the Defendant refused.
>
> A person is not required to give a sample of any bodily substance; however, you may consider a refusal in reaching your verdict.

Bartlett argues first that a refusal of a blood test, in and of itself, is not considered a refusal to submit under section 321J.6(2). That is certainly true for purposes of license revocation under section 321J.9. However, this case does not involve a challenge to the license revocation provisions under that section. Instead, this appeal concerns the admission of evidence of a refusal under section 321J.16.[2] Thus, the issue to be decided by this court is whether a refusal took place for purposes of section 321J.16. If a refusal occurred, the submission of the instruction was proper. If a refusal did not occur, the submission of the instruction was erroneous and Bartlett's objection should have been granted.

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[2] Section 321J.6(2) provides:

> The peace officer shall determine which of the three substances, breath, blood, or urine, shall be tested. Refusal to submit to a chemical test of urine or breath is deemed a refusal to submit, and section 321J.9 applies. A refusal to submit to a chemical test of blood is not deemed a refusal to submit, but in that case, the peace officer shall then determine which one of the other two substances shall be tested and offer the test. If the peace officer fails to offer a test within two hours after the preliminary screening test is administered or refused or the arrest is made, whichever occurs first, a test is not required, and there shall be no revocation under section 321J.9.

Section 321J.16 provides:

> If a person refuses to submit to a chemical test, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating a motor vehicle in violation of section 321J.2 or 321J.2A.

We first note the only substance requested by Deputy Raum was blood. Breath or urine was not requested. However, we find the factual situation in this case to be similar to the Iowa case of *State v. Dulaney*, 493 N.W.2d 787, 789 (Iowa 1992). In that case, the Iowa Supreme Court found that Dulaney impliedly refused *any* testing. *Dulaney*, 493 N.W.2d at 789. The court went on to hold that a total failure to cooperate in chemical testing is "tantamount to a declination." *Id.* (citation omitted). In the present case, Bartlett refused a blood test, refused to check on a form whether or not he consented, and refused to sign the form.

Generally, anything less than unqualified, unequivocal consent is considered a refusal. *Ginsberg v. Iowa Dep't of Transp.*, 508 N.W.2d 663, 664 (Iowa 1993). We consider the defendant's and officer's words and conduct, as well as the surrounding circumstances, to determine if the defendant has refused all testing. *State v. Bloomer*, 618 N.W.2d 550, 553 (Iowa 2000). We conclude Bartlett's complete failure to cooperate was "tantamount to a declination" and was an implied refusal of any testing. Having so found, we conclude the district court properly overruled Bartlett's objection to the instruction under section 321J.16.

III. Ineffective Assistance of Counsel

Bartlett contends he received ineffective assistance of counsel at his criminal trial. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied

defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

Bartlett first claims he received ineffective assistance because his defense counsel failed to object to the marshalling instruction. The marshalling instruction provided:

> The State must prove both of the following elements of Operating While Intoxicated:
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> 1. On or about the 28th day of June, 2008, the Defendant operated a motor vehicle.
>
> 2. At that time, the Defendant was under the influence of an alcoholic beverage or other drug or a combination of such substances.
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> If the State has proved both of these elements, the Defendant is guilty. If the State has failed to prove either of the elements, the Defendant is not guilty.

Bartlett asserts there was no evidence to support the submission of the language referring to an "other drug or a combination of such substances." He claims that under the jury instructions he could have been found guilty of conduct for which there was no factual support in the record.

A claim of ineffective assistance should be rejected if counsel fails to object to an erroneous instruction when the instruction causes no prejudice. *State v. Corsi*, 686 N.W.2d 215, 223 (Iowa 2004) (citing *State v. Aldape*, 307 N.W.2d 32, 44 (Iowa 1981)). "When the submission of a superfluous jury instruction does not give rise to a reasonable probability the outcome of the proceeding would have been different had counsel not erred, in the context of an ineffective-assistance-of-counsel claim, no prejudice results." *State v. Maxwell*,

743 N.W.2d 185, 197 (Iowa 2008). Additionally, "when there is no suggestion the instruction contradicts another instruction or misstates the law there cannot be a showing of prejudice for purposes of an ineffective-assistance-of-counsel claim." *Id.*

Bartlett has not shown a reasonable probability the outcome of the criminal trial would have been different if defense counsel had objected to the marshalling instruction. As discussed above, there was clear evidence to show Bartlett had been operating while intoxicated. We conclude Bartlett has not shown he received ineffective assistance due to counsel's failure to object to the marshalling instruction.

We have carefully reviewed Bartlett's other two claims of ineffective assistance and find them to be without merit.

We affirm Bartlett's conviction for operating while intoxicated.

AFFIRMED.

Eisenhauer, J., concurs; Potterfield, J., concurs specially.

POTTERFIELD, J. (concurring specially)

I write separately because I disagree with the majority's conclusion that the jury was instructed properly that it could consider Bartlett's alleged refusal of a blood sample. Although Bartlett clearly refused the blood test, he was entitled to an offer of a urine or breath test under Iowa Code section 321J.6(2) (2007). The fact that either of those tests, or applying for a search warrant, were logistically inconvenient for the trooper does not alter the mandate of the code section.

The majority finds that Bartlett's refusals to submit to withdrawal of his blood, to place a check on the form, and to sign the form constitute a total failure to cooperate "tantamount to a declination," quoting from *State v. Dulaney*, 493 N.W.2d 787, 789 (Iowa 1992). The court in *Dulaney* held that test results will not be suppressed when law enforcement fails to offer the alternative tests, since the officer "can force a blood test on the defendant by getting a search warrant pursuant to section 321J.10" as the trooper did in *Dulaney*. *Dulaney*, 493 N.W.2d at 789 (citing *State v. Owens*, 418 N.W.2d 340 (Iowa 1988)). Unlike *Dulaney*, Bartlett does not seek to suppress evidence of any test of his alcohol concentration. Bartlett simply objected to the jury instruction on refusal to submit to a chemical test. Since refusal of a blood test, even an unequivocal refusal, is not a "refusal to submit" under Iowa Code section 321J.6(2), I conclude that the court should have sustained Bartlett's objection to the jury instruction.

However, because the evidence of Bartlett's intoxication was overwhelming, the jury instruction at issue did not result in prejudice. *State v.*

Fintel, 689 N.W.2d 95, 99 (Iowa 2004). I join the other members of the panel in affirming Bartlett's conviction.