No. 21-1319
Polk County No. 05771 FECR340733

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

v.

DAVID DWIGHT JACKSON,
Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE SCOTT BEATTIE (Suppression Motion)
HONORABLE DAVID PORTER (Trial)

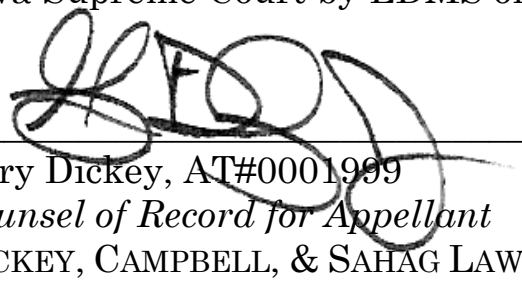
FINAL BRIEF FOR APPELLANT

Gary Dickey
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com
Counsel for Appellant

PROOF OF SERVICE & CERTIFICATE OF FILING

On April 24, 2023, I served this brief on all other parties by EDMS to their respective counsel, and I mailed a copy of this brief to my client at Fort Dodge Correctional Facility.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on April 24, 2023.



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES

I. WHETHER THE TRIAL COURT ERRED IN DENYING JACKSON'S MOTION TO SUPPRESS BASED ON FALSE STATEMENTS CONTAINED IN THE SEARCH WARRANT APPLICATION

CASES

Franks v. Delaware, 438 U.S. 154 (1978)
Henry v. United States, 361 U.S. 98 (1959)
Illinois v. Gates, 462 U.S. 213 (1983)
State v. Brown, 930 N.W.2d 840 (Iowa 2019)
State v. Green, 540 N.W.2d 649 (Iowa 1995)
State v. Groff, 323 N.W.2d 204 (Iowa 1982)
State v. Harlan, 301 N.W.2d 717 (Iowa 1981)
State v. Harris, 490 N.W.2d 561 (Iowa 1992)
State v. McManus, 243 N.W.2d 575 (Iowa 1976)
State v. McNeal, 867 N.W.2d 91 (Iowa 2015)
State v. Niehaus, 452 N.W.2d 184 (Iowa 1990)
State v. Payne, 2011 Iowa App. LEXIS 318 (Iowa Ct. App. May 11, 2011)
State v. Showalter, 427 N.W.2d 166 (Iowa 1988)
United States v. Gladney, 48 F.3d 309 (8th Cir. 1995)
United States v. Grubbs, 547 U.S. 90 (2006)
United States v. Reed, 921 F.3d 751 (8th Cir. 2019)
Wong Sun v. United States, 371 U.S. 471 (1963)

OTHER AUTHORITIES

U.S. Const. Amend. IV
U.S. Const. Amend XIV

II. WHETHER THE DISTRICT COURT ERRED IN ALLOWING TESTIMONY ABOUT INFORMATION CONTAINED IN JACKSON'S MEDICAL RECORDS

CASES

Hawkins v. Grinnell Reg'l Med. Ctr., 929 N.W.2d 261 (Iowa 2019)
In re Det. of Stenzel, 827 N.W.2d 690 (Iowa 2013)
Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)
McElroy v. State, 637 N.W.2d 488 (Iowa 2001)
State v. Demaray, 704 N.W.2d 60 (Iowa 2005)
State v. Elliott, 806 N.W.2d 660 (Iowa 2011)
State v. Henneberry, 558 N.W.2d 708 (Iowa 1997)
State v. Hornik, 672 N.W.2d 836 (Iowa 2003)
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
State v. Mitchell, 450 N.W.2d 828 (Iowa 1990)
State v. Nims, 357 N.W.2d 608 (Iowa 1984)
State v. Plain, 898 N.W.2d 801 (Iowa 2017)

OTHER AUTHORITIES

Iowa R. Evid. 5.801
Iowa R. Evid. 5.802
Iowa R. Evid. 5.803

1 John W. Strong et al., *McCormick on Evidence* § 72 (5th ed. 1999)

ROUTING STATEMENT

Transfer to the court of appeals is appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

David Jackson appeals his conviction, sentence, and judgment following a jury trial and verdict finding him guilty of homicide by vehicle while operating under the influence, leaving the scene of an accident resulting in death, and operating without owner's consent.

On August 20, 2020, the State of Iowa filed a five-count trial information in the Iowa District Court for Polk County charging Jackson as follows:

- Count I: HOMICIDE BY VEHICLE- OPERATING UNDER THE INFLUENCE, in violation of Iowa Code section 7076A(1), a class "B" felony, subject to the seventy-percent mandatory minimum set forth in Iowa Code section 902.12(6);

- Count II: HOMICIDE BY VEHICLE- RECKLESS DRIVING, in violation of Iowa Code section 707.6A(2), a class "C" Felony subject to the seventy-percent mandatory minimum set forth in Iowa Code section 902.12(6);

- Count III: LEAVE SCENE OF ACCIDENT- DEATH, in violation of Iowa Code section 321.261(4), a class "D" felony;

- Count IV: THEFT IN THE SECOND DEGREE, in violation of Iowa Code sections 714.1, 714.2(2), a class "D" felony; and

- Count V: OPERATING WHILE UNDER THE INFLUENCE, 1ST OFFENSE, in violation of Iowa Code section 321J.2(2)(a), a serious misdemeanor.

(App. at 6). Jackson entered pleas of "not guilty" to the charges. (App. at 9).

On January 8, 2021, Jackson filed a motion to suppress the test results from a blood draw made pursuant to a search warrant. (App. at 11). Specifically, Jackson asserted that the warrant application contained false statements concerning field sobriety tests ("FSTs") when, in fact, no FSTs were ever performed on him. (App. at 12). After an evidentiary hearing, the district court denied Jackson's motion. (App. at 18).

On April 12, 2021, the jury returned a verdict finding Jackson guilty of homicide by vehicle by operating while under the influence, reckless driving, leaving the scene of an accident resulting in death, and operating a motor vehicle without owner's consent. (04/09/21 Trial Tr. Vol. V at 60:1-18, App. at 23). The district court ordered the counts to run concurrently and imposed a term of incarceration not to exceed twenty-five years. (App. at 34-35). Pursuant to Iowa Code sections 902.12(6) and 321.261(4)),

the court ordered that Jackson would not be eligible for parole until he serves at least seventy percent of his sentence. (App. at 34). The court also ordered Jackson to pay $150,000 in restitution pursuant to Iowa Code section 910.3B. (App. at 35).

Jackson timely filed a notice of appeal. (App. at 39).

STATEMENT OF FACTS

At approximately 8:30 p.m. on August 9, 2021, a Toyota Prius being driven by David Jackson collided with a Slingshot[1] on Martin Luther King Jr. Parkway ("MLK") just north of Prospect Road in Des Moines, Iowa. (04/06/21 Trial Tr. Vol. II at 33:19 to 37:7). The driver of the Slingshot, Bounleua Lovan, died from multiple blunt force injuries sustained in the accident. (04/06/21 Trial Tr. Vol. II at 29:18-21, 04/07/21 Trial Tr. Vol. III at 91:16-22, 93:6-8). Eyewitness Timothy Gilbert testified that Jackson turned south onto MLK from Euclid Avenue and drove normally for approximately three quarters of a mile. (04/06/21 Trial Tr. Vol. II at 40:3-22). As the Prius approached Prospect Road, it accelerated

[1] A Slingshot is a "reverse trike" motorcycle with two wheels in the front and one in the back. (04/06/21 Trial Tr. Vol. II at 36:18-25)

quickly, crossed over two lanes of traffic, and struck the Slingshot head on. (04/06/21 Trial Tr. Vol. II at 34:24 to 35:15). From the way the Prius veered off course, Gilbert assumed the driver was experiencing a medical problem. (04/06/21 Trial Tr. Vol. II at 37:2-7).

The Des Moines Police Department's accident reconstructionist, Bryan Wickett, was able to retrieve information from the Prius's electronic data recorder and retrace the path of the vehicle:

(04/07/21 Trial Tr. Vol. III at 36:11 to 38:22; App. at 52). The information revealed that the Prius was traveling 57 mph one second before collision. (04/07/21 Trial Tr. Vol. III at 53:4-12, 54:4-9). Officer Wickett determined that the Prius's steering wheel remained fixed at three degrees from center, which he concluded explained why it crossed the center line and struck the Slingshot. (04/07/21 Trial Tr. Vol. III at 82:12-18). He also discovered that Jackson did not apply his brakes prior to or after impact. (04/07/21 Trial Tr. Vol. III at 53:4-12, 54:4-9). Instead, the Prius continued over the curb and crashed into a building located 220 feet from the location of the slingshot:

(04/06/21 Trial Tr. Vol. II at 107:18-23, 04/07/21 Trial Tr. Vol. III at 71:11-16; App. at 51).

Prior to the accident, Jackson borrowed the Prius from his neighbor's girlfriend. (04/07/21 Trial Tr. Vol. III at 137:7-15). He had been quarantined for two weeks because of a COVID-19 exposure and was on his way to Broadlawn's Medical Center to get paperwork to give to his employer. (04/07/21 Trial Tr. Vol. III at 161:1 to 164:24). After pulling onto MLK, Jackson started to have tightness in his chest, his breathing became restricted, and he blacked out at the wheel. (04/07/21 Trial Tr. Vol. III at 141:16 to 142:6). His next memory was being in a confused state, getting out of his car, and encountering an African-American lady standing in front of him. (04/07/21 Trial Tr. Vol. III at 142:7 to 143:23). Thinking that he had crashed into a concrete wall, Jackson started walking towards to the nearby assisted living facility. (04/07/21 Trial Tr. Vol. III at 143:24 to 144:22). He attempted to go into the lobby, but the inside door was locked. (04/07/21 Trial Tr. Vol. III at 146:10-20).

Des Moines Police Officer George Latcham encountered Jackson sitting at a picnic table outside the main entrance to the assisted living facility. (04/06/21 Trial Tr. Vol. II at 72:2-5). Officer Latcham's body camera video shows that he ordered Jackson to the ground and threatened him with pepper spray mace if he did not comply. (State's Ex. 6). Jackson initially got down on all fours but then took off running. (State's Ex. 6). At that point, Officer Latcham sprayed Jackson with pepper mace. (04/06/21 Trial Tr. Vol. II at 72:22 to 73:10). Jackson then ran directly into a concrete pillar and was subdued shortly thereafter. (04/07/21 Trial Tr. Vol. III at 150:23 to 152:5). He was taken to the hospital where they gave him Ativan to calm him down. (04/06/21 Trial Tr. Vol. II at 178:6-15).

Des Moines Police Officer Nathan Nemmers applied for and obtained a search warrant to draw a blood sample from Jackson to test for drugs and alcohol. (04/06/21 Trial Tr. Vol. II at 170:5-14). Iowa Division of Criminal Investigation criminalist Justin Grodnitzky conducted a toxicology examination of Jackson's blood, which revealed the presence of amphetamines at 16 ng/mL,

methamphetamines at 104 ng/mL, and Lorazepam (a/k/a Ativan) at less than 10 ng/ML. (04/07/21 Trial Tr. Vol. III at 21:14 to 22:8, 23:13-16). Grodnitzky testified that 20 to 50 ng/mL is the therapeutic range for methamphetamines when it is prescribed to treat obesity, narcolepsy, and ADHD-type disorders. (04/07/21 Trial Tr. Vol. III at 25:20 to 26:1). He was unable to say, however, whether the level of methamphetamines in Jackson's blood sample rendered him intoxicated without knowing his tolerance to the drug. (04/07/21 Trial Tr. Vol. III at 26:17-25)

The State charged Jackson with homicide by vehicle while operating under the influence and other related charges as part of a five-count trial information. (App. at 6). After a five-day trial, the jury found Jackson guilty of homicide by vehicle by operating while under the influence, reckless driving, leaving the scene of an accident resulting in death, and operating a motor vehicle without owner's consent.[2] (04/09/21 Trial Tr. Vol. V at 60:1-18, App. at 23-26). The district court ordered the counts to run concurrently and

[2] Prior to submission of the case to the jury, the State dismissed Count V, which charged Jackson with first-offense OWI. (04/09/21 Trial Tr. Vol. V at 5:19-25).

imposed a term of incarceration not to exceed twenty-five years. (App. at 34-35). This appeal followed. (App. at 39).

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE SUPPRESSED THE FRUITS OF THE TOXICOLOGY EXAMINATION BECAUSE THE SEARCH WARRANT CONTAINED FALSE STATEMENTS MADE IN RECKLESS DISREGARD OF THE TRUTH

Error Preservation

Jackson's trial counsel preserved error by moving to suppress the toxicology report and obtaining a ruling on the motion. (App. at 11, 18).

Scope and Standard of Review

De novo review applies to Jackson's challenge to the search warrant. *State v. Niehaus*, 452 N.W.2d 184, 187 (Iowa 1990).

Analysis

A. Applicable legal principles

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but only upon probable cause,

> supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amends. IV, XIV. The Iowa Constitution provides the same guarantees. *State v. Showalter*, 427 N.W.2d 166, 168 (Iowa 1988). Historically, the State has been required to present evidence to a neutral and detached magistrate establishing probable cause that a crime has been committed in order to obtain a search warrant. The classic statement of the background of probable cause appears in *Henry v. United States*, 361 U.S. 98 (1959), in which the United States Supreme Court explained:

> The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against that practice . . . .
>
> * * *
>
> That philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a

> warrant for arrest. And that principle has survived to this day.

Id. at 100-01 (footnotes omitted). These principles apply to searches as well as seizures. The probable cause requirement described in *Henry* is "the quintessential 'precondition to the valid exercise of executive power." *United States v. Grubbs*, 547 U.S. 90, 98 (2006).

To establish probable cause, the State must show a "a person of reasonable prudence would believe a crime was committed." *State v. McNeal*, 867 N.W.2d 91, 99 (Iowa 2015). "Probable cause to search requires a probability determination that (1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched." *Id.* The magistrate considering a warrant application "is simply [required] to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before [the magistrate], including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). A reviewing appellate court's role is to ensure that the "magistrate had a 'substantial basis for . . . conclud[ing]' that

probable cause existed." *Id.* at 238-39 (alteration and omission in original).

B. Officer Nemmers acted recklessly when he submitted a sworn affidavit to the court containing false information without first reading it

On August 9, 2020, Officer Nemmers applied for a search warrant seeking a specimen of Jackson's "blood, urine, and/or breath specimen" (App. at 41). At the end of the application, Nemmers swore that the "facts establishing the grounds for issuance of a search warrant are as set forth in the attachments made a part of this application." (App. at 41). Polk County Attorney Jaki Livingston reviewed and approved the application. (App. at 41). In an attachment entitled "A-2 – OBSERVATIONS OF IMPARIMENT," Officer Nemmers indicated that he performed FSTs on Jackson and set forth the following results:

Standardized Field Sobriety Tests (Please Indicate score, refusal, or inability)

	Test	Score / Refusal / Inability
✓	Horizontal gaze nystagmus	Passed
✓	Walk and Turn	Failed - 7 of 8 clues
✓	One leg stand	Failed - 3 of 4 clues
✓	Preliminary breath test results	.000
	Admission to drinking	
✓	Other: Lack of Convergence - not present, Modified Romberg Balace Test - 18 seconds	

(App. at 43). In reality, Nemmers never performed any FSTs. (01/26/21 Motion to Suppress Hr'g Tr. at 11:10-15). At the suppression hearing, Nemmers testified that he used a previous application and did not remove the information concerning the FSTs:

> Q. So let's go back, if we can, to the field sobriety test part. Can you explain why you included that section with the check marks for six different items and scores for pass or fail? Can you explain why you included those things in the search warrant?
>
> A. Just an oversight on my part. As I went through the form, not realizing I didn't delete it out or realizing it was there or needed to be deleted from a previous application.

(01/26/21 Motion to Suppress Hr'g Tr. at 12:10-18). On cross-examination, he conceded that he did not read the application before submitting it to the judge for review. (01/26/21 Motion to Suppress Hr'g Tr. at 21:2 to 22:1).

"Under *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), police officers commit a constitutional violation if they knowingly or 'with reckless disregard for the truth' falsely support a warrant application." *State v. Brown*, 930 N.W.2d 840, 916 (Iowa 2019). The remedy for such a Fourth Amendment violation is to excise

the false statements from the warrant application. If the remainder of the application fails to establish probable cause, the fruits of the search must be suppressed. *Niehaus*, 452 N.W.2d at 186-87.

"A 'false' affidavit statement is one which misleads the magistrate into believing the existence of certain facts which enter into his thought process in evaluating probable cause." *State v. Groff*, 323 N.W.2d 204, 210 (Iowa 1982). Under that standard, there can be no meaningful dispute that the information in the warrant application about the results of the Jackson FSTs was false. More importantly, Officer Nemmers conceded that he did not read the warrant attachment before submitting it for judicial review. Reckless disregard is established by proof that the officer "had obvious reasons to doubt the accuracy of the information" contained in the warrant affidavit. *United States v. Reed*, 921 F.3d 751, 756 (8th Cir. 2019). Clearly, Officer Nemmers would have had obvious reason to doubt the accuracy of the contents of an affidavit that he did not bother to read. To hold otherwise would reward officers who behave like ostriches when preparing

warrant applications. Indeed, the central principle underlying *Franks* is that the warrant requirement would be "reduced to a nullity" if a police officer is allowed to mislead the magistrate and "remain confident that the ploy was worthwhile." *Franks*, 438 U.S. at 168. Yet, this principle would be forever frustrated if statements are beyond judicial review simply because the officer failed to read the entire search warrant application.

C. Officer Nemmers acted recklessly when he submitted a sworn affidavit that omitted material facts that would cast doubt on the existence of probable cause

The *Franks* analysis applies equally to omissions of fact. *United States v. Gladney*, 48 F.3d 309, 313 (8th Cir. 1995). To challenge a warrant affidavit for material omissions, a defendant must show: 1) that facts were omitted in reckless disregard of whether they make the affidavit misleading, and 2) if supplemented by the omitted information, the affidavit could not support a finding of probable cause. *Id.* (citations omitted). In this case, Officer Nemmers supported the search warrant application with following information about the officers' observations of Jackson:

ATTACHMENT A-2 – OBSERVATIONS OF IMPAIRMENT

The Suspect was transported to: Broadlawns Medical Center, 1801 Hickman Road, Des Moines, IA

The following officer(s) are certified in Iowa Code § 321J.2 in the same manner as Affiant. Officer(s) made the following observations of Suspect establishing probable cause that Suspect is under the involved of an alcoholic beverage, and / or controlled substance and / or drug:

Officer(s)

- _____
- _____
- _____

Time observations began: 2039 hrs

- ✓ Bloodshot eyes
- ✓ Watery eyes
- _____ Slurred speech
- ✓ Mumbling speech
- _____ Smell of alcoholic beverage coming from Suspect's person
- ✓ Unsteady gait / unsteady balance
- _____ Open containers observed at scene
- ✓ Emotions visibly excited
- ✓ Judgment impaired
- ✓ Reason or mental ability affected
- _____ Soiled clothing
- ✓ Other observations of impairment: Suspect was incoherent, unaware why he was at the hospital.

_____ Suspect is currently unconscious or otherwise unable to consent.

* * *

Suspect was incoherent, unaware why he was at the hospital. Suspect was unaware that he had been involved in an accident. Suspect was displaying behavior consistent with drug use including profuse sweating, grinding teeth, and inability to remain still.

(App. at 43). Notably absent from the warrant application is any mention that Officer Latcham used pepper spray mace on Jackson while taking him into custody. Indeed, Nemmers admitted that he was aware that Jackson had been pepper sprayed on the scene. (01/26/21 Motion to Suppress Hr'g Tr. at 21:2 to 22:1).

This omission is material because the use of pepper spray explains several of the observations that Nemmers suggested were

indicative of impairment. Officer Latcham, who previously has been sprayed with mace himself, explained at trial that it is a tool used to gain control of an uncooperative suspect through "pain compliance." (04/06/21 Trial Tr. Vol. II at 77:4-25). In his words, mace is very painful and causes involuntary redness and watering of the eyes. (04/06/21 Trial Tr. Vol. II at 77:4-25). He likened it a "super sunburn" that causes runny nose and a burning sensation to the skin. (04/06/21 Trial Tr. Vol. II at 77:4 to 78:9).

The Iowa Supreme Court has recognized that omissions of fact constitute misrepresentations under *Franks* when "the omitted facts 'cast doubt on the existence of probable cause.'" *State v. Green*, 540 N.W.2d 649, 657 (Iowa 1995) (citation omitted). Similarly, the "failure to include information and a reckless disregard for its consequences may be inferred from the fact that the information was omitted, although the defendant must show the omitted material would be clearly critical to the finding of probable cause." *Gladney*, 48 F.3d at 313-14 (quotation omitted). Here, the probable cause issue was straightforward—was there probable cause to believe that Jackson operated his

motor vehicle under the influence of drugs or alcohol? The presence of "bloodshot" and "watery eyes" has long been recognized by Iowa appellate courts as a strong indicator of intoxication. *State v. Harris*, 490 N.W.2d 561, 563 (Iowa 1992); *State v. Harlan*, 301 N.W.2d 717, 720 (Iowa 1981). The omission of information about the mace "created a false connection" between Jackson's purported bloodshot, watery eyes and intoxication. *Gladney*, 48 F.3d at 314.

D. The remainder of the search warrant does not establish probable cause to believe Jackson operated his vehicle while under the influence

If the Court determines that Nemmer's false representations and material omissions were done recklessly, it must consider whether the remaining information in the warrant establishes probable cause. *Niehaus*, 452 N.W.2d at 186-87. The answer is plainly "no." The remaining information in warrant consists mainly of conclusory statements and fact that are consistent with person involved in a serious head-on accident followed by being sprayed with pepper mace. But, "innocent-appearing activity cannot be used to bolster an otherwise inadequate warrant

application." *State v. McManus*, 243 N.W.2d 575, 579 (Iowa 1976). Likewise, the occurrence of an accident alone does not suggest intoxication. *State v. Payne*, 2011 Iowa App. LEXIS 318 at *8 (Iowa Ct. App. May 11, 2011). The warrant, therefore, was invalid, and all evidence seized during the search, as well as all fruits from the search, must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963)

II. THE DISTRICT COURT ERRED IN ADMITTING TESTIMONY CONCERNING CONFIDENTIAL MEDICAL INFORMATION FROM THE JAIL HEALTH ADMINISTRATOR WITHOUT JACKSON'S CONSENT

Error Preservation

Jackson's trial counsel preserved error by contemporaneously objecting to the testimony about information contained in his medical records on the basis that it was confidential and hearsay. (04/08/21 Trial Tr. Vol. IV at 55:7 to 57:9).

Scope and Standard of Review

Appellate courts review decisions on the admissibility of evidence for errors at law. *State v. Hornik*, 672 N.W.2d 836, 838 (Iowa 2003).

Analysis

At trial, Jackson testified that he "blacked out" on two separate occasions prior to August 9, 2020. (04/07/21 Trial Tr. Vol. III at 156:25 to 166:7). He also testified that his heart rate dropped to 34 upon admission to the Broadlawns intensive care unit following the accident. (04/07/21 Trial Tr. Vol. III at 153:19 to 154:7). To refute this testimony, the State called Polk County Jail health services administrator Dale Peterson in rebuttal to testify about information contained the discharge records Broadlawns provided to the jail upon Jackson's admission. (04/08/21 Trial Tr. Vol. IV at 58:12 to 61:14). Jackson's attorney objected to Peterson's testimony on the basis that the information in the records was privileged and hearsay. (04/08/21 Trial Tr. Vol. IV at 55:7 to 56:9). The district court denied the objection and provided the following explanation on the record:

> THE COURT: Okay. So, Ms. Hart Lunde, what specifically is your objection? Is your objection that there's a HIPAA violation? Is your objection hearsay? Is your objection relevance? What specifically is your objection?
>
> MS. HART LUNDE: I would raise the HIPAA violation. I would also raise a hearsay violation. I

would also raise this is not the best evidence, and this is not the witness to attest to what exactly is in the Broadlawns medical records. We're lacking context. I also think that Mr. Peterson is not a competent witness to testify to the actions of a treating physician and what the -- what's in those actual reports. That would -- those would be the issues that I would raise.

THE COURT: Okay. As it relates to the hearsay objection, the hearsay objection -- correction. The HIPAA objection is overruled. Ms. Livingston has indicated that this testimony, she believes, is essential to rebutting claims the defendant made and opened the door for yesterday during his direct examination, and, therefore, Mr. Peterson, I will instruct you that you are to testify.

What was the other objection?

MS. HART LUNDE: To -- just as far as HIPAA; correct? I also raised hearsay, best evidence, and the witness is incompetent to testify to specific medical conditions of a treating physician.

THE COURT: As it relates to competency, that objection is overruled too. If Ms. Livingston does not lay the proper foundation regarding this witness' competency to testify regarding the subject matter for which he's testifying, you can re-raise the objection at that time, so the competency objection is overruled.

Best evidence is overruled. This is not the type of testimony the best evidence rule is designed to regulate.

As it relates to the hearsay objection, it's overruled on two grounds: alternative theory, one, it's not being offered for the truth of the matter asserted.

Ms. Livingston, I believe you indicated that you're offering it to show the subsequent course of

> conduct that the jail did as far as their treatment of Mr. Jackson once he arrived there.
>
> Alternative theory for admission under 5.803(1) -- correction, subsection 3, then existing mental, emotional, or physical condition. A statement of the declarant's, Mr. Jackson's, then-existing state of mind, such as motive, intent, or plan, or emotional, sensory, or physical condition, such as mental feeling, pain, or bodily health, is admissible as an exception to the hearsay rule. So the hearsay rule is overruled -- hearsay objection is overruled.

(04/08/21 Trial Tr. Vol. IV at 55:7 to 57:9).

Peterson then testified on direct examination that Jackson's medical records indicated that he had normal vitals signs and a normal pulse oximetry level. (04/08/21 Trial Tr. Vol. IV at 61:3 to 63:7). He also testified that nothing in Jackson's discharge records indicated he had difficulty breathing or a history of blacking out. (04/08/21 Trial Tr. Vol. IV at 55:7 to 57:9). Peterson further testified that the jail placed Jackson on "an alcohol and opioid detox program," which is designed for any "patient that states they have been using either opioids or alcohol or Benzos." (04/08/21 Trial Tr. Vol. IV at 63:18 to 64:15). On cross-examination, Peterson acknowledged that he had only reviewed Jackson's discharge records. (04/08/21 Trial Tr. Vol. IV at 66:9 to

67:9). Because he had not reviewed the treatment records, Peterson could not testify about Jackson's vital signs or hear rate on August 9th or 10th. (04/08/21 Trial Tr. Vol. IV at 67:5-21).

A. Jackson did not waive confidentiality of his Broadlawns medical records

The Iowa Supreme Court has held that "evidence covered by a privilege is generally not admissible, absent a waiver." *State v. Demaray*, 704 N.W.2d 60, 64 (Iowa 2005); (citing 1 John W. Strong et al., *McCormick on Evidence* § 72 (5th ed. 1999)). There is no real question that the discharge records from Broadlawns containing medical information about Jackson's care are covered by the Health Insurance Portability Accountability and the physician-patient privilege under Iowa Code section 622.10(1). *See State v. Henneberry*, 558 N.W.2d 708, 709 (Iowa 1997) ("Three elements must be established in order for the privilege to be applicable: (1) the relationship of doctor-patient; (2) the acquisition of the information or knowledge during this relationship; and (3) the necessity of the information to treat the patient skillfully"). Accordingly, the admissibility of Peterson's testimony about information in Jackson's medical records turns on

whether Jackson waived the privilege. *Demaray*, 704 N.W.2d at 64.

Peterson and the prosecutor conceded that Jackson had not provided him with a written release authorizing the disclosure of information contained in his records:

> THE COURT: I'll have you slide as close as you can to that microphone and lower the microphone a little bit, okay?
>
> Because that testimony would be HIPAA protected, a couple things -- one of a couple things can happen: One, Mr. Jackson would need to waive that protection. As you sit here today, have you or anyone in the Polk County Sheriff's Office received a waiver from Mr. Jackson allowing you to provide testimony regarding medical treatment?
>
> THE WITNESS: No, I have not.
>
> * * *
>
> MS. LIVINGSTON: Well, part of the problem, Judge, is that because the defendant put his health into the record, but has not waived any of his rights and has not given us access to any information, Mr. Peterson can't tell me exactly what's in the records, so I don't know, but the defendant has made his health that day his primary -- his sole defense without any evidence whatsoever. I should have an opportunity to rebut that.

(04/08/21 Trial Tr. Vol. IV at 67:5-21, 54:15-22). Those concession should have been the end of the matter. In addition to the

absence of any signed release, Jackson's attorney objected to the testimony. At that point, there was no doubt that he did not consent to release of information from his Broadlawns medical records.

Rather than decide whether Jackson waived privilege over his medical records, the district court ruled that he "opened the door" through his testimony at trial. As the Iowa Supreme Court has recognized, the "phrase 'open the door' is sometimes used as a reference to the doctrine of curative admissibility." *State v. Huser*, 894 N.W.2d 472, 506 (Iowa 2017). "The doctrine of curative admissibility, however, only applies when inadmissible evidence has been entered into the record and the other party seeks to admit further inadmissible evidence to cure the error." *Id.* at 506-5-7. "This is what is colloquially referred to as the 'fight fire with fire' theory." *Id.* at 507. That concept does not apply to this case. Jackson's testimony about his history of blackouts did not contain inadmissible evidence. Nor did his testimony about his heart rate upon admission to the intensive care unit. More to the point, the prosecutor made no objection. Accordingly, Jackson's testimony

did not open the door to anything. It surely did not waive his privilege to the confidentiality of his medical records.[3] The district court's ruling to the contrary was clear error.

B. Peterson's testimony about the information contained in Jackson's medical records constitutes hearsay

Hearsay "is a statement, other than one made by the declarant while testifying at . . . trial, . . . offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). Hearsay is not admissible unless it falls within one of several enumerated exceptions. *Id.* R. of Evid. 5.802. Before considering the exemptions and exceptions to the rule against hearsay, an inquiry must first be made to determine if the evidence under consideration is "a statement . . . offered in evidence to prove the truth of the matter asserted." *Id.* R. of Evid. 5.801(c). Peterson's testimony about information contained in Jackson's Broadlawns medical records is black-letter hearsay. *Madison v.*

[3] Even if Jackson somehow opened the proverbial door, it did not swing open wide enough to allow Peterson's testimony. Peterson expressly disavowed knowledge of information contained in Jackson's medical records from August 9th and 10th. (04/08/21 Trial Tr. Vol. IV at 67:5-21). For that reason, Peterson's testimony about the information in Jackson's discharge records is closer to the idiom of two ships passing in the night.

Colby, 348 N.W.2d 202, 203-204 (Iowa 1984) (recognizing that testimony about the contents of a medical records by someone other than the treating physician is hearsay). To get around the hearsay problem, the district court ruled that Peterson's testimony was not offered for the truth of the matter asserted but instead to "show the subsequent course of conduct that the jail did as far as their treatment of Mr. Jackson once he arrived there." (04/08/21 Trial Tr. Vol. IV at 56:22-25). This is wrong as matter of law and as a matter of fact.

As a legal matter, there is no "responsive conduct" exception to the hearsay rule. *See* Iowa R. Evid. 5.803. For a statement to be admissible as showing responsive conduct, it must not only tend to explain the responsive conduct, but the conduct itself must be relevant to some aspect of the State's case. *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). "In essence, the court must determine whether the statement is truly relevant to the purpose for which it is being offered, or whether the statement is merely an attempt to put before the fact finder inadmissible evidence." *Id.* Moreover, "if the evidence is admitted, the court must limit its

scope to that needed to achieve its purpose." *State v. Plain*, 898 N.W.2d 801, 812 (Iowa 2017) (quoting *McElroy v. State*, 637 N.W.2d 488, 402 (Iowa 2001)).

As a factual matter, the jail's medical treatment of Jackson was not relevant to any disputed issue. In any event, the prosecutor simply could have asked Peterson to identify Jackson's treatment in provided without eliciting hearsay evidence from Jackson's Broadlawns records. Trouble is, the prosecutor did not use Peterson's testimony only to explain the jail's treatment of Jackson. In closing, you used his testimony as substantive evidence of Jackson's medical history:

> He tells you, "I didn't know I took meth." He tells you, "I had -- when I was admitted to the hospital, I couldn't breathe. I had a heart rate of 34," but Mr. Peterson had the records, the records that the defendant couldn't produce, wouldn't produce. Mr. Peterson had the records that said when he was admitted to the hospital, his oxygen level was 98 percent. When your oxygen level is almost perfect, you don't have a problem breathing. His vital signs were all stable and normal when he was admitted.
>
> He was admitted for polysubstance abuse. He was admitted for -- I can't pronounce it any better than he was able to pronounce it, his illness, his diagnosis for his dehydration. He was admitted for motor vehicle accident. Then, when he was admitted into the jail, by

> his self-report, he was put into a detox program, but he tells you all he wasn't under the influence of anything.
>
> * * *
>
> That is the substance of his testimony. His heart rate was 34 or 37 when he went to the hospital. That's what he told you. But the documentation is different. Mr. Peterson testified that the records show that his vitals were normal. Yes, he has this medical condition and, yes, that needed some treatment.
>
> But just think, common sense. What kind of effect do drugs have on your system? What kind of effect does methamphetamine have on your system? It sucks the life out of you. No wonder he needs some kind of treatment for that. No wonder that might be triggered. But don't forget he was admitted for polysubstance abuse. Don't forget that he was treated at the hospital -- at the jail because of his admissions for detox.

(04/09/21 Trial Tr. Vol. V at 25:5-21, 51:11-25). As used in this way, Peterson's testimony was "merely an attempt to put before the fact finder inadmissible evidence." *Plain*, 898 N.W.2d at 813.

As a fallback, the district court allowed Peterson's testimony under Iowa Rule of Evidence 5.803(3) to show Jackson's existing "mental, emotional, or physical condition." (04/08/21 Trial Tr. Vol. IV at 57:1-9). The problem with the court's analysis is that Rule 5.808(3), by definition, applies to statements "of the declarant's then existing state of mind." Iowa R. Evid. 5.803(3). The

declarant of the statements about which Peterson testified was Jackson's treating physician—not Jackson. The State cannot introduce a declarant's statements under Rule 5.803(3) as evidence of someone else's state of mind. Hence, the district court erred in relying on Rule 5.803(3) to admit Peterson's testimony about statements contained in Jackson's medical records.

C. The admission of Peterson's testimony prejudiced Jackson's defense

The case law is clear and extensive that prejudice is presumed if hearsay is admitted unless the State affirmatively establishes to the contrary. *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 266 (Iowa 2019); *In re Det. of Stenzel*, 827 N.W.2d 690, 708 (Iowa 2013); *State v. Elliott*, 806 N.W.2d 660, 669 (Iowa 2011); *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). Even without the presumption of prejudice, Peterson's testimony was undeniably damaging. Jackson's theory of defense was that he blacked out from a medical condition, which caused the accident. There was plenty of evidence in the records to support this defense. The State's own eyewitness testified that he assumed the driver of the Prius was experiencing a medical emergency. On top

of that, information from the vehicle's event record established that Jackson suddenly accelerated and did not apply the brakes before or after the collision—which is also consistent with a medical event. Lastly, Jackson testified that he blacked as he approached Prospect Road. Recognizing that, if believed, this evidence would create reasonable doubt as to the causation element of the homicide by vehicle charge, the State used Peterson's testimony to undermine Jackson's defense. Consequently, Jackson is entitled to a new trial.

CONCLUSION

For the reasons set forth above, David Jackson requests this Court to reverse his convictions and remand to the district court with instructions consistent with its opinion.

REQUEST FOR ORAL ARGUMENT

Jackson requests to be heard in oral argument.

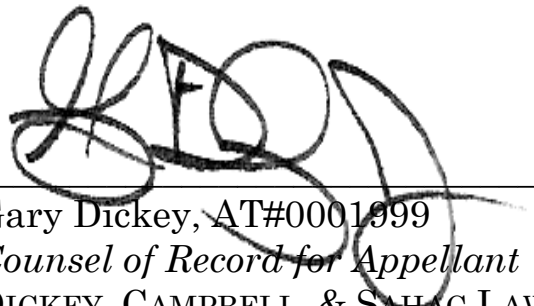
COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $ 15.00, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

> [x] this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14 point and contains 5,761 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com