IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0894

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DESHAUN WILLIAMS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
THE HONORABLE PAUL G. CRAWFORD, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
tyler.buller@iowa.gov

DAN KOLACIA
Boone County Attorney

MATTHEW SPEERS
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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ROUTING STATEMENT

This case demonstrates there is some confusion regarding the reach of *State v. Green*, 722 N.W.2d 650 (Iowa 2006), which seems to have added the element of notice to the crime of driving while suspended. The defendant urges that *Green* be expanded to also apply to an operating-while-barred prosecution, which the State resists. *See* Defendant's Proof Br. at 8–11. However, as explained in the briefing, the State maintains this issue was not preserved, which weighs against retention. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Deshaun Williams, appeals his convictions for OWI – third offense (habitual offender), a Class D felony in violation of Iowa Code sections 321J.2, 902.8, and 902.9(3) (2013), and operating while barred (habitual offender), an aggravated misdemeanor in violation of Iowa Code sections 321.560, 321.561 (2013). The defendant was convicted following trial by jury in the Boone County District Court, the Hon. Paul G. Crawford presiding.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Around 2:00 a.m., 21-year-old Sydney Neubauer was picking up a friend in Ames when she saw a car driving erratically. Trial tr. p. 21, line 25 — p. 23, line 22. At first, the car was "going really slow" right after they got onto Highway 30, then the car "swerved and almost hit [Sydney's] car." Trial tr. p. 23, lines 14–22. Sydney dropped back and observed that the driver "kept swerving to like on the shoulder, then back to the median, back to the shoulder[.]" Trial tr. p. 23, lines 14–22.

Based on what she saw, Sydney thought the driver of the car "was intoxicated." Trial tr. p. 28, lines 12–14. She called the police. Trial tr. p. 23, lines 14–22.

While talking to the dispatcher, Sydney observed the driver continue to display impairment: "[There was a] lot of swerving. Almost in the ditch on the shoulder, then right almost to the median. Driving slow. Then driving really fast." Trial tr. p. 24, lines 7–13. Sydney estimated the car was alternating between 35, at the slowest,

and 85, at the fastest. Trial tr. p. 24, lines 21–25. Sydney said the driving was "scaring the crap out of [her]." Exhibit 1: 911 Recording, at approx. 2:00–2:10.

The dispatcher told Sydney to follow the car from a distance if she felt comfortable, so she did. *See* trial tr. p. 25, lines 7–25. Sydney reported a partial license plate to dispatch: 57YRY, Iowa plates, "maybe" Story County. *See* Exhibit 1: 911 Recording, at approx. 1:30–1:50.

Eventually, the car pulled onto a gravel road, turned around, and the driver shut the lights off. Trial tr. p. 26, lines 1–13. Story County deputies arrived a few minutes later and found a vehicle that matched Sydney's description. Trial tr. p. 26, lines 14–18; p. 54, lines 16–17.

Deputies observed that the vehicle was turned on, and they approached. Trial tr. p. 54, lines 19–24. The defendant was in the driver's seat. Trial tr. p. 55, lines 2–11. Deputies advised him to exit the vehicle. Trial tr. p. 38, line 12 — p. 39, line 2. The defendant "kind of stumbled" and deputies observed that his speech was "very slow and very slurred." Trial tr. p. 38, line 23 — p. 39, line 2. Deputies also immediately smelled a "very strong odor of alcoholic

beverage." Trial tr. p. 55, line 12 — p. 56, line 1. Deputies observed that the defendant appeared to have vomited on himself. *See* trial tr. p. 69, lines 2–5.

The defendant asked the deputies why they had stopped him; the deputies explained that the defendant had pulled himself over, and the deputies had approached later. *See* trial tr. p. 38, line 23 — p. 39, line 7. The defendant told the deputies that he had "dropped nine people off," yet he was driving a sedan that could not hold that many passengers. *See* trial tr. p. 48, lines 0–15.

The deputies asked for the defendant's license. The defendant eventually (and reluctantly) provided a non-driver identification card. Trial tr. p. 55, line 12 — p. 56, line 13. The deputies ran the defendant's identification. Trial tr. p. 39, lines 8–25. The system reported that the defendant was "barred from driving" and the defendant acknowledged to the deputies that he was barred. Trial tr. p. 40, lines 1–9; p. 56, lines 17–20; *see also* State's Exhibit 7: Certified Driving Record; App. 1–3; trial tr. p. 65, line 22 — p. 66, line 4.

The defendant refused field sobriety tests. Trial tr. p. 41, line 14 — p. 42, line 4; p. 67, lines 7–23; *see* State's Exhibit 2: Body Cam. He also refused to provide a preliminary breath-test sample. Trial tr. p.

41, line 14 — p. 42, line 4 *see* State's Exhibit 2: Body Cam. Deputies continued to observe a "strong odor of an ingested alcoholic beverage," as well as bloodshot, watery eyes. Trial tr. p. 40, lines 13–25. The defendant was arrested and taken to the Boone County jail. Trial tr. p. 42, lines 8–13.

On the ride to the jail, the defendant was "somewhat upset" and the deputy recalled the defendant "cussed at [him] quite a bit." Trial tr. p. 42 line 22 — p. 43, line 3. At one point, the defendant said that "he knew he shouldn't be driving." Trial tr. p. 43, lines 4–8. He also expressed confusion about where he was. *See* trial tr. p. 46, line 25 — p. 37, line 3.

The defendant refused the DataMaster breath test at the station. Trial tr. p. 70, lines 3–5. He appears confused and intoxicated on a recording of his behavior at the jail. *See* State's Exhibit 4: Jail Recording.

ARGUMENT

I. The Defendant Did Not Preserve His Sufficiency Challenge. But Even If He Had, There Was Sufficient Evidence the Defendant Operated the Vehicle.[1]

Preservation of Error

A motion for judgment of acquittal only preserves error as to the specific elements challenged in the district court. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999); *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). The defendant's motion for judgment of acquittal[2] solely concerned whether the defendant "was under the influence of an alcoholic beverage." Trial tr. p. 85, line 19 — p. 86, line 6. In other words, he challenged the "while intoxicated" element, not the "operating" element. The defendant did not preserve error as to the "operating" element of "operating while intoxicated" and therefore this complaint cannot be heard on appeal. *See Greene*, 592 N.W.2d at 29; *Crone*, 545 N.W.2d at 270.

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[1] The divisions of the defendant's brief are not numbered. The State has separated them to comply with the rules. *See* Iowa R. App. P. 6.903(g) ("The argument section shall be structured so that each issue raised on appeal is addressed in a separately numbered division.").

[2] The defense referred repeatedly to a "motion for a directed verdict" in the district court, but the context makes clear the parties were discussing a motion for judgment of acquittal. *See* Iowa R. Crim. P. 2.19(8).

Standard of Review

When evaluating a sufficiency challenge, evidence is viewed in the light most favorable to the State and all reasonable inferences are drawn to uphold the verdict. *State v. Leckington*, 713 N.W.2d 208, 212–13 (Iowa 2006). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

In his brief, the defendant makes the following assertion about the standard of review:

> While the standard in granting the motion at the conclusion of the case requires the Court to take every fact in the light most favorable to the State, the same standard does not apply to reviewing a conviction after a jury verdict. The sufficiency of the evidence goes more to the weight of the evidence and whether a reasonable jury could have found beyond a reasonable doubt the Appellant was guilty of Operating While Intoxicated.

Defendant's Proof Br. at 7. The defendant is wrong insofar as he suggests a sufficiency review does not involve viewing the evidence in the light most favorable to the State. That is literally the standard. *See, e.g.*, *Leckington*, 713 N.W.2d at 212–13. While there is a difference between a motion for judgment of acquittal (sufficiency of

the evidence) and a motion for new trial (weight of the evidence), the defendant does not challenge whether a motion for new trial should have been granted. *See generally* Defendant's Proof Br.; *State v. Ellis*, 578 N.W.2d 655 (Iowa 1998).

Merits

If this Court reaches the merits of the defendant's complaint, the district court should be affirmed. There was substantial evidence to support the jury's conclusion that the defendant was operating the vehicle.

A deputy testified that the car was on when he arrived and that the defendant was "the driver":

> **Q:** Was the vehicle on?
>
> **A:** Yes, sir.
>
> **Q:** Were the lights off?
>
> **A:** That's correct.
>
> **Q:** Did you make contact with the driver?
>
> **A:** I did.
>
> **Q:** Is he in the courtroom today?
>
> **A:** Yes, sir.
>
> **Q:** Could you please point to him and identify him by the clothing?

> **A:** It would be the gentleman sitting at the table.[3]
>
> **Q:** Where you located the defendant in his vehicle, that was in Boone County here in Iowa?
>
> **A:** Yes, sir, it is.

Trial tr. p. 54, line 23 — p. 55, line 11. This alone was sufficient for the State to meets its burden. *See State v. Hopkins*, 576 N.W.2d 374, 377–78 (Iowa 1998); *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996).

That the defendant operated the vehicle was also supported by the defendant's claim that he had dropped people off (and hence been driving), as well as by Sydney's testimony that she did not see anyone get into or out of the vehicle until the deputies arrived and spoke with the defendant. Trial tr. p. 26, lines 21–23; p. 48, lines 9–15. Similarly, the defendant is the only person seen on the body cam. *See* State's Exhibit 2: Body Cam. Finally, the defendant also expressed consciousness of guilt when he told the deputies "he knew he shouldn't be driving" that night. Trial tr. p. 43, lines 4–8. From these facts, the jury reasonably concluded the defendant was

[3] Trial counsel was female.

operating the vehicle and the verdict was supported by substantial evidence.

II. The Defendant Did Not Preserve His Complaint About Mailed Notice. Proof of Mailing Is Not An Element of Operating While Barred.[4]

Waiver

The defendant's second claim (that there was insufficient evidence on Count II because the State did not offer testimony about mailing notice) is waived in at least two ways. First, it is invited error, because the defendant's attorney requested the State not admit the affidavit of mailing and the State complied with the request. And second, jury instructions are law of the case, and the jury in this case was not required to find the defendant had notice his license was barred or that such a notice was mailed.

As to the first waiver, the State did not offer the affidavit of mailing specifically because the defendant's trial attorney made a record that she intended to object if the affidavit of mailing was offered into evidence. *See* trial tr. p. 60, line 2 — p. 61, line 3. The defendant cannot request the State not offer certain evidence and

[4] To the extent the defendant also challenges sufficiency of the "operating" element for Count II, the evidence is sufficient for the same reasons set forth in Division I.

then complain on appeal when that evidence is absent. *See Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 196 (Iowa 2007) (on judicial estoppel, how parties cannot advance inconsistent positions following success with an argument); *Jasper v. State*, 477 N.W.2d 852, 856 (Iowa 1991) (noting one "cannot deliberately act so as to invite error and then object because the court has accepted the invitation"); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa Ct. App. 1989) ("Under the Doctrine of Invited Error, it is elementary a litigant cannot complain of error which he has invited[.]").

Second, jury instructions are law of the case on appeal, whether they are "right or wrong." *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988); *accord State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009). The jury was instructed that operating while barred has two elements: (1) operating and (2) while barred. *See* Jury Instr. No. 5: Elements of Driving While Barred; App. 4. There is no instruction telling the jury they must find the defendant was mailed proof his license was barred, in order to return a guilty verdict. *See generally* Jury Instr. The defendant had no substantive objections to the instructions as given, nor did his attorney request an instruction to make proof of mailing an element of the offense. *See generally* trial

tr. p. 101, line 8 — p. 107, line 12. Because the jury instructions are law of the case, the offense of operating while barred only has two elements in this appeal—even if this Court might think it should have three—and the defendant's conviction must be affirmed.

Preservation of Error

Error was not preserved. While the mailing issue was discussed during a motion for judgment of acquittal, the jury was not instructed that proof of notice was an element of the crime and those instructions bind this Court on appeal as law of the case for reviewing sufficiency. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988); *accord State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009).

Standard of Review

If error had been preserved, review would be for correction of errors at law. Iowa R. App. P. 6.907.

Merits

Notice that one is barred from driving is not an element needed for the crime of operating while barred.[5] There is no mention of that requirement in the statutory provisions criminalizing the act. *See*

[5] The parties below refer to this crime as "driving while barred," as do many judicial opinions. Given the language of the statute, "operating while barred" appears to be a more correct description. *See* Iowa Code §§ 321.560, 321.561 (2013).

Iowa Code §§ 321.560, 321.561 (2013). Thus, to the extent there are Court of Appeals opinions that suggest in dicta that proof of mailing is an element of operating while barred, those opinions misconstrue the statute: Iowa crimes are purely statutory and a court cannot add elements to a statute today, even though this was permissible under the common law. *See, e.g., State v. Wolford Corp.*, 689 N.W.2d 471, 473 (Iowa 2004).

The crime of operating while barred has two and only two elements: (1) operating and (2) while barred. *See* Iowa Code § 321.561 (2013); *accord State v. Carmer*, 465 N.W.2d 303, 304 (Iowa Ct. App. 1990) (citing *State v. Thompson*, 357 N.W.2d 591 (Iowa 1984), which noted the elements of operating while suspended are [1] suspended and [2] operating)). That is how the jury was instructed in this case, and that marshaling instruction binds this Court on appeal. *See* Jury Instr. No. 5: Elements of Driving While Barred; App. 4; *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988). Even the defendant's trial attorney, despite arguing proof of notice should be needed, repeatedly conceded that it was not an element required for conviction. *See, e.g.*, trial tr. p. 89, lines 5–10 ("I agree that in the elements of driving while barred that this [proof of mailing] isn't

listed…"); p. 89, lines 16–19 (relying on case law and claiming "even though it's not an element of the offense … they [the State] do have to prove that a notice was sent").

To the extent the defendant urges this Court to expand *State v. Green*, 722 N.W.2d 650 (Iowa 2006), to operating-while-barred cases, this Court should reject the invitation. Nothing about section 321.561 suggests that proof of mailing is required for a conviction. *See* Iowa Code § 321.561 (2013). To add elements, contrary to legislative intent, violates separation of powers and usurps the role of the legislature. If this case is retained or presented to the Supreme Court, *Green* should be overruled or confined to its facts, to eliminate the confusion expressed by the district court. *See* trial tr. p. 98, lines 11–16 ("… All these cases do is confuse the court.") To the extent the defendant believes *Green* suggests proof of mailing is required for a conviction of operating while barred, his reliance on dicta to expand *Green* is misplaced.

To the extent this Court looks to *Green* for guidance, it can be distinguished. As the district court recognized, the Code does not impose a requirement that habitual offenders be notified by mail. *See* trial tr. p. 95, line 18 — p. 96, line 10; p. 99, line 5. Thus, while *Green*

arguably impacts driving-while-suspended prosecutions, it does not affect operating-while-barred prosecutions, particularly given the instructions at issue in this case. . *See* Jury Instr. No. 5: Elements of Driving While Barred; App. 4.

Finally, even if *Green* does apply to some operating-while-barred cases, it should not apply here. This defendant admitted to knowledge that his license was barred:

> **Q:** … Do you recall hearing if the defendant was barred from driving?
>
> **A:** Yes. Yes, he was barred from driving.
>
> **Q:** Did the defendant acknowledge that?
>
> **A:** He did.

Trial tr. p. 40, lines 5–9. This renders the notice issue irrelevant, as the defendant must have had notice if he knew he was barred.

CONCLUSION

The State respectfully requests this Court affirm the defendant's convictions.

REQUEST FOR NONORAL SUBMISSION

This case can be decided on the briefs.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tyler.buller@iowa.gov

CERTIFICATE OF COMPLIANCE

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

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TYLER J. BULLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tyler.buller@iowa.gov