IN THE COURT OF APPEALS OF IOWA

No. 0-119 / 09-0866
Filed April 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD G. BINNING,
Defendant-Appellant.

Appeal from the Iowa District Court for Decatur County, Sherman Phipps, Judge.

The defendant appeals his conviction for operating while intoxicated. **AFFIRMED.**

Ward A. Rouse of Berg, Rouse, Spaulding, & Schmidt, P.L.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Lisa Hynden Jeanes, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

Richard Binning appeals from his conviction for operating while intoxicated. This case was tried to the court on the stipulated minutes of testimony. On appeal, Binning challenges the sufficiency of the evidence. We affirm.

I. Background Facts and Proceedings.

On September 14, 2007, Binning was charged with operating while intoxicated in violation of Iowa Code section 321J.2 (2007). The minutes of testimony set forth the following facts: At approximately 3:32 a.m. on August 18, 2007, Kendall Wood, a reserve officer of the Leon Police Department, discovered a one-vehicle accident involving a Chevrolet truck along County Highway J-20. Binning had been ejected from the vehicle and the vehicle was upside down. Wood used his cell phone to call 911 and requested law enforcement officials and emergency medical services respond to the scene. He remained at the scene as officers from the Decatur County Sheriff's Office and the Lamoni Police Department and emergency medical providers arrived.

S.J. Barney, a deputy from the Decatur County Sheriff's Office, and Andrew Cole, an officer from the Lamoni Police Department, were two of the arriving officers. Both observed that a Chevrolet pickup truck had rolled several times in a ditch and come to a stop upside down on a fence. Grand River EMS and Decatur County emergency medical technicians had responded to the scene and were providing medical treatment to Binning. Binning had sustained serious injury. The deputy and officer determined that Binning had been driving the truck at the time of the accident, there were no passengers in the vehicle, and thus

there was "no need to search further for additional ejected persons." Binning stated that he had been ejected from the vehicle. Binning was then taken by ambulance to the Decatur County Hospital for emergency medical treatment.

Officer Cole "searched for alcohol containers in the path of the vehicle as it had rolled" and found "an open cold container of Busch Light beer located approximately five feet from the suspect vehicle and an unopened cold container of Busch Light beer located in a white plastic bag within the Defendant's vehicle." After Binning was taken to the hospital, Officer Cole remained at the accident scene to inventory the vehicle for towing and impound. Deputy Barney went to the hospital.

At the hospital, Deputy Barney met with Binning. Binning stated that he was driving the vehicle at the time of the accident and "did not believe he was secured by his safety belt as required by law." Deputy Barney asked Binning if he had consumed alcoholic beverages before the accident, "and [Binning's] response was unclear." Binning consented to a preliminary breath test that showed his blood alcohol concentration exceeded the legal limit. Deputy Barney then invoked implied consent and obtained a blood sample from Binning, which demonstrated that Binning had a blood alcohol concentration of .160.

An accident investigation determined that Binning's vehicle was heading eastbound on County Highway J-20 when it entered a curve, crossed the center dividing line, and went off the north (wrong) side of the highway into the ditch where it rolled or flipped before coming to rest on a fence.

Binning entered a plea of not guilty. On October 29, 2007, Binning filed a motion to suppress the result of the blood test, which the district court granted.

The State sought discretionary review. This court reversed the district court's ruling. *State v. Binning*, No. 08-0226 (Iowa Ct. App. Oct. 1, 2008). Binning waived his right to a jury trial and proceeded to a bench trial on the minutes of testimony. On March 19, 2009, the district court found Binning guilty as charged. On May 15, 2009, Binning was sentenced to two days in jail and a fine of $1250 plus surcharge.

Binning now appeals. His sole claim is that the evidence was insufficient to convict him of operating while intoxicated.

II. Standard of Review.

We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). "The district court's findings of guilt are binding on appeal if supported by substantial evidence. Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *Id*. "We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly reasonable be deduced from the evidence in the record." *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002); *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). We consider all the evidence introduced at trial, not just the evidence supporting guilt. *Hopkins*, 576 N.W.2d at 377. "Although [the defendant] cites to evidence introduced at the suppression hearing, for purposes of reviewing the sufficiency of the evidence to support the judgment of conviction, we confine our consideration to the trial record." *State v. Adams*, 554 N.W.2d 686, 691 (Iowa 1996); *see Thompson v. State*, 586 S.E.2d 231, 232-33 & n.6 (Ga. 2003) (discussing that in reviewing the sufficiency of the evidence,

review is limited to evidence actually presented to the fact finder and evidence outside of the trial record should not be considered).

III. Analysis.

The elements of operating while intoxicated as applied to Binning are: (1) Binning operated a motor vehicle and (2) Binning had a blood alcohol level in excess of the legal limit while doing so. Iowa Code § 321J.2(1); *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Binning does not challenge the fact that he was operating a motor vehicle that crashed. Indeed, the minutes indicate that he admitted this. Binning also does not question (at this point) the test results establishing he had a .160 blood alcohol level after he had been taken to the hospital. Rather, Binning claims it is possible he consumed alcoholic beverages *after* the accident and, thus, the State did not prove he was intoxicated while operating his vehicle.

We disagree. The record contains substantial evidence to support a finding that Binning was intoxicated while he was driving, not merely afterward. *See Hopkins*, 576 N.W.2d at 378 (discussing that operation while intoxicated may be established by circumstantial evidence as well as direct evidence); *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996) (same). The minutes of testimony show that while driving, Binning crossed the center line, drove off the wrong side of the highway and lost control of his vehicle, ultimately rolling it in the ditch on the opposite side of the road on which he was traveling. *See Truesdell*, 679 N.W.2d at 618 (considering the manner in which the defendant was driving in determining whether the defendant was under the influence of alcohol); *State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992) (same). After officers arrived at

the accident scene, Binning informed them that he was driving the vehicle, did not think he was wearing his seat belt, and was ejected from the truck during the accident. Binning sustained serious injury, which required treatment by emergency medical providers at the accident scene and at the hospital.

Furthermore, an officer searched for alcohol containers and, according to the minutes, found only two cans of beer at the scene of the accident—an opened cold can of beer five feet from Binning's truck and an unopened cold can of beer in a plastic bag in Binning's truck. *See Hopkins*, 576 N.W.2d at 378 (discussing that no liquor bottles were found in the car); *Boleyn*, 547 N.W.2d at 205 (discussing that the only alcohol container in the vicinity was a three-quarters full bottle of beer). When the blood test was administered at the hospital, Binning's blood alcohol level was .160. Based on the very limited quantity of beer found at the accident scene, a fact finder could conclude that Binning had been intoxicated before reaching that scene. Also, the location of the opened can, i.e., next to the truck, would allow the fact finder to infer that Binning had been drinking it while driving, rather than after he had been ejected from the truck.

Binning argues this case is analogous to *State v. Creighton*, 201 N.W.2d 471 (Iowa 1972), where the supreme court reversed an operating while intoxicated conviction based on insufficient evidence. There the defendant was found injured and wandering after running his car into a ditch. *Creighton*, 201 N.W.2d at 472. The patrolman opined that the defendant was under the influence at the time he was arrested, but no tests were administered. *Id*. at 473. Crucially, "[n]o search was made of the car nor of the surrounding area to

disclose evidence—or the lack of it—to refute a claim defendant may have become intoxicated *after* the accident." *Id*. (emphasis in original).

This case is quite different. Here a blood test showed the defendant was far above the legal limit. The defendant, who had been ejected from his vehicle, was found seriously injured at the scene, not wandering about. Most importantly, the search of the accident scene that did not occur in *Creighton* was performed here.[1] That search provides substantial evidence "to refute a claim defendant may have become intoxicated *after* the accident." *Id*.[2]

We agree that the minutes of testimony leave us curious about some aspects of this case. For example, what were Binning's "serious injuries"? However, both parties stipulated to a trial on the minutes. Our obligation as a reviewing court is to determine if the minutes provide substantial evidence in support of the verdict. We believe they do.[3]

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[1] Binning concedes that "in the case at hand, such a search was conducted," but he maintains that it revealed "a reasonable possibility, if not likelihood, that Mr. Binning became impaired post-operation." We disagree that the minutes reveal a "likelihood" that Binning became impaired post-operation. Only one opened can was found at the accident scene, and it was found five feet from the overturned vehicle. Binning had been ejected from the vehicle, and was seriously injured. He had been driving erratically prior to the accident: The minutes show that his vehicle crossed the center line and went off the wrong side of the highway. *See State v. Frake*, 450 N.W.2d 817, 818-819 (Iowa 1990) (holding that the existence of evidence which might support a different verdict does not negate the existence of substantial evidence to support a guilty verdict).

[2] The State also urges that the *Creighton* decision is based upon an outdated rule relating to circumstantial evidence. *See State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979). However, we need not reach that issue, because we believe *Creighton* is factually distinguishable in any event.

[3] Binning also asserts that the district court shifted the burden of proof to him to establish that he had consumed alcoholic beverages after the accident. This argument was not raised by Binning until his reply brief and, therefore, we decline to consider it. *See Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) ("[A]n issue cannot be asserted for the first time in a reply brief"). In any event, despite some loose language in the district court's ruling (e.g., "There is no evidence that [Binning] had access to or claims to have consumed alcoholic beverages following his ejection from the vehicle."), we are persuaded by the entirety of the district court's opinion that it applied the appropriate

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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legal standards and required the State to prove all elements of the charge beyond a reasonable doubt. *See* Ruling, p. 1 ("The evidence establishes beyond a reasonable doubt the following . . . .").