

IN THE COURT OF APPEALS OF IOWA

No. 1-215 / 10-1349
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW JOHN PAYNE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Gregory D. Brandt,
District Associate Judge.

Matthew Payne appeals the judgment and sentence entered upon his
conviction of operating a motor vehicle while intoxicated, second offense.

REVERSED.

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, John P. Sarcone, County Attorney, and David M. Porter, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Zimmer, S.J.* Tabor, J.,
takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

POTTERFIELD, J.**I. Background Facts and Proceedings**

Shortly after 8:00 p.m. on January 4, 2010, Officer Ryan Swagler received a report that there was “a car in the ditch up the road.” Swagler responded and arrived at the scene around 8:20 p.m. to find a car off the road, resting against a utility pole. There was no one in or around the car. The road made an S-shaped curve in the area, and Swagler testified it appeared as though the car had driven straight instead of curving with the road. It had snowed that evening, but Swagler testified the road had been plowed and he had no trouble navigating the road. Swagler testified the tire tracks in the snow were fresh as if the accident had just happened but admitted he had “no idea” what time the accident had occurred.

As Swagler arrived, another vehicle pulled up with Matthew Payne in the passenger seat. Payne exited the vehicle and began to “go through” the car in the ditch. Swagler testified Payne was evasive, but once Swagler got close, he noticed Payne smelled of alcohol and had bloodshot, watery eyes. Swagler assumed the car belonged to Payne and asked him how his car ended up in the ditch. Payne responded that he “got in the snow and it pulled him in.” Payne denied that he had consumed any alcohol that evening.

Swagler requested an officer to assist him in conducting an investigation concerning a possible intoxicated driver, and Officer Colin Boone was dispatched to the location. Boone also observed that Payne had bloodshot, watery eyes and smelled of alcohol. Boone asked Payne whether he had been drinking, and Payne said that after the accident, he had gone home and had one twenty-four-

ounce can of beer. After Payne performed poorly on field sobriety tests, Boone placed him under arrest. Payne submitted to a breath test at 9:24 p.m. that showed a blood alcohol concentration of .122.

Payne was charged with operating while intoxicated in violation of Iowa Code section 321J.2 (2009). A bench trial commenced June 4, 2010. At trial, Payne admitted he had been operating the vehicle at the time of the accident. Payne stipulated there was probable cause to arrest him and to invoke implied consent. He also stipulated that the results of his breath test were .122. Payne explained that he was run off the road by a cube van going the opposite direction that was “hogging the road.” He testified a passerby gave him a ride home, and he proceeded to drink between four and ten beers. He testified that one and one-half to two hours after the accident, he got a ride back to his car to determine whether he would need to have the car towed. Payne admitted he lied to Swagler and Boone about how much he had to drink that night.

At the close of the State’s evidence Payne moved for judgment of acquittal, arguing the State failed to establish Payne was under the influence of alcohol at the time he operated the motor vehicle. The court denied the motion. Payne renewed his motion at the close of the evidence, and the court reserved ruling on the motion.

On July 6, 2010, the court filed a verdict finding Payne guilty of operating while intoxicated. The court found, “Payne has no credibility with this court,” pointing to Payne’s varying stories regarding the amount of alcohol he consumed the night of his accident. The court relied on four factors to determine there was sufficient evidence to support a finding Payne was intoxicated at the time he

drove his car into the ditch: (1) Swagler’s testimony that the tire tracks he saw in the snow around 8:20 p.m. were fresh tracks; (2) the fact that Payne lost control of his vehicle when other motorists were able to navigate the area; (3) its conclusion that Payne would not have been able to absorb sufficient alcohol in a two-hour time period to reach a blood alcohol level of .122;¹ and (4) its finding that common sense “does not support the contention that after getting into an accident . . . where alcohol was not involved, that one would go home, drink to a level of intoxication of .122, and then return to the location of the accident.”

Payne appeals, arguing: (1) there was insufficient evidence to prove his intoxication at the time he operated the vehicle and (2) his counsel was ineffective for failing to object to the district court’s reliance on facts not in the record relating to the rate of absorption of alcohol as a basis for its guilty verdict.

II. Sufficiency of the Evidence

We review sufficiency of the evidence challenges for correction of errors at law. *State v. Chang*, 587 N.W.2d 459, 461–62 (Iowa 1998). The district court’s findings of guilt are binding on appeal if supported by substantial evidence. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). “Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.” *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). We view the evidence in the light most favorable to the State, “including legitimate inferences and presumptions that may fairly and reasonably be deduced from the

¹ Neither party presented expert or scientific evidence about the typical rate of alcohol absorption or individual factors relevant to Payne. Because this evidence was not admitted at trial, we do not consider it in determining the sufficiency of the evidence on appeal.

record evidence.” *Id.* Direct and circumstantial evidence are equally probative. *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa Ct. App. 1999). “Use of circumstantial evidence is limited only by the rule that, like direct evidence, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture.” *State v. Clarke*, 475 N.W.2d 193, 197 (Iowa 1991). “The State must prove every fact necessary to constitute the crime with which the defendant is charged.” *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002).

The offense of operating while intoxicated consists of two essential elements: (1) the defendant operated a motor vehicle (2) while under the influence of alcohol or while having an alcohol concentration of .08 or more. Iowa Code § 321J.2(1). Payne asserts the State failed to prove he was intoxicated at the time he operated the car. We agree.

[T]he fact a defendant was under the influence of an alcoholic beverage at the time of his arrest, without a showing of more, will not support a finding he was in that condition when driving a motor vehicle at some earlier time.

State v. Creighton, 201 N.W.2d 471, 473 (Iowa 1972).² The State “failed to show anything beyond the happening of an accident and the subsequent confrontation between defendant and the officer.” *See id.* The circumstantial evidence presented by the State created nothing more than mere speculation that Payne was under the influence at the time he operated his vehicle.

² We acknowledge that *Creighton* relies in part on an outdated rule relating to circumstantial evidence, stating, “The circumstantial evidence rule is subject to the caveat that it must be entirely consistent with defendant’s guilt and wholly inconsistent with any rational hypothesis of innocence.” 201 N.W.2d at 473. In *State v. O’Connell*, 275 N.W.2d 197, 205 (Iowa 1979), the supreme court held direct and circumstantial evidence are equally probative for purposes of proving guilt beyond a reasonable doubt. Nevertheless, we believe the analysis and legal reasoning of *Creighton* are relevant to this appeal.

Swagler testified he did not know what time the accident occurred and therefore could not have known how much time had elapsed since the accident. Nor did Swagler have any knowledge of what transpired between the time of the accident and Payne's return to the scene of the accident. *Id.* ("The accident was a one-car event. There were no witnesses. We have no way of knowing when it occurred; how much later the highway patrolman arrived (he refused to say); or what transpired between the time of the accident and the time of arrest. This hardly meets the State's burden of proof."). Swagler's testimony that Payne's tire tracks were fresh is weakened by the fact that the record suggests it was no longer snowing at the time Swagler arrived; therefore, the tracks in the snow do not establish that "the time period between the accident and Payne's return to the scene was much shorter than Payne stated at trial," as argued by the State.

The State relies primarily on three contentions: (1) Payne was not a credible witness; (2) Payne's failure to curve with the roadway and subsequent accident suggest intoxication; and (3) "it seems unreasonable that [Payne] would leave the scene, drink to a level of intoxication, and then return to the scene." Though we defer to the district court's findings that Payne was not a credible witness, the State cannot meet its burden of proof with merely a credibility finding adverse to the defendant. Nor does the occurrence of an accident, without more, suggest intoxication. The State's arguments are not sufficient to meet the State's burden of proof beyond a reasonable doubt that Payne was intoxicated at the time he drove his car.

We decline to hold that because Payne was intoxicated at the time of his arrest, he was "necessarily in that condition at some earlier unspecified moment"

without sufficient evidence concerning the length of the interval between the two moments or the events occurring during the interval. *Id.* Because we conclude substantial evidence does not support the district court's finding of guilt, we reverse Payne's conviction for operating while intoxicated.³

REVERSED.

Zimmer, S.J., concurs; Sackett, C.J., dissents.

³ Because we reverse based on the insufficiency of the evidence, we decline to address Payne's argument regarding ineffective assistance of counsel.

SACKETT, C.J. (dissenting)

I would affirm the trial court.