

**IN THE COURT OF APPEALS OF IOWA**

No. 6-365 / 05-0590  
Filed June 14, 2006

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**PHILIP EUGENE BOEHM,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Floyd County, Peter B. Newell,  
District Associate Judge.

Philip Boehm appeals following his conviction for operating while  
intoxicated. **AFFIRMED.**

Richard D. Stochl of Elwood, O'Donohoe, Stochl, Braun & Churbuck, New  
Hampton, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney  
General, Marilyn Dettmer, County Attorney, and Kimberly L. Birch, Assistant  
County Attorney, for appellee.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

**HECHT, J.**

Philip Boehm appeals following his conviction for operating while intoxicated (OWI), in violation of Iowa Code section 321J.2 (2003). He maintains he was entitled to a partial directed verdict based on the State's inability to establish his breath test occurred within two hours of his operation of a motor vehicle. We affirm.

**Background Facts and Proceedings.**

A reasonable juror could have found the following facts from the record in this case. Around 10:45 p.m. on July 5, 2004, Deputy Crooks responded to a reported automobile accident. Shortly thereafter Deputy Kelley arrived at the scene of the accident and observed Crooks administering sobriety tests to a female. Kelly also observed Philip Boehm sitting in a pickup truck parked nearby and engaged him in conversation. Boehm explained that he had responded to a call from Penny Matte, whom Deputy Crooks was then attending to, requesting assistance after the accident. After Deputy Kelley noticed an odor of alcohol coming from Boehm's truck, he asked Boehm to step out of the vehicle and administered field sobriety tests on him.

Based on the results of the horizontal gaze nystagmus test, Deputy Kelley arrested Boehm and transported him to the police station for further testing. Boehm consented to a breath test at 12:14 a.m. after consulting an attorney. That test revealed a blood alcohol concentration of .110.

The State charged Boehm with OWI.<sup>1</sup> Following the presentation of evidence at the subsequent trial, Boehm made an oral motion for judgment of acquittal contending the State presented insufficient evidence to establish that he drove his vehicle within two hours of the time the breath test was administered. See Iowa Code § 321J.2(8)(a) (2003). The district court denied the motion and the jury found Boehm guilty as charged. The court granted Boehm a deferred judgment, but ordered one year of probation and twenty-four hours of community service. Boehm appeals, challenging the sufficiency of the evidence supporting the conviction.<sup>2</sup>

### **Scope and Standard of Review.**

We review Boehm's sufficiency-of-the-evidence challenge for the correction of errors at law. *State v. Randle*, 555 N.W.2d 666, 671 (Iowa 1996). We review all evidence in the record in the light most favorable to the State to determine whether the verdict is supported by substantial evidence. *Id.* Substantial evidence is the quality and quantity of evidence that could persuade a reasonable person of a defendant's guilt beyond a reasonable doubt. *State v. Smith*, 508 N.W.2d 101, 102 (Iowa Ct. App. 1993).

### **Analysis.**

The State had the burden to prove beyond a reasonable doubt that Boehm operated a motor vehicle while under the influence of alcohol or while

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<sup>1</sup> The State charged Boehm with driving a motor vehicle while under the influence of alcohol or while having a blood alcohol concentration of .08 or more. Iowa Code § 321J.2(1)(a) (under the influence), (b) (alcohol concentration over .08).

<sup>2</sup> The State claims Boehm's appeal "appears" to be untimely. We disagree. While his notice of appeal was not filed within the thirty-day timeframe provided for the taking of appeals, see Iowa R. App. P. 6.5(1), it was served within that timeframe and filed at a reasonable time thereafter. Iowa R. Civ. P. 1.442(4).

having a blood alcohol concentration of .08 or more. Iowa Code § 321J.2(1)(a) (under the influence), (b) (alcohol concentration over .08). The alcohol concentration found within a specimen of Boehm's blood, breath, or urine drawn within two hours after he drove a motor vehicle is presumed to be the concentration when he was driving. Iowa Code § 321J.2(8)(a). Boehm maintains the evidence is insufficient to establish that he operated his vehicle within two hours of the breath test, and that he was thus entitled to a directed verdict on the charge under section 321J.2(1)(b).

Deputy Kelley administered the breath test at 12:14 a.m. Thus, in order for the State to receive the benefit of the presumption provided by section 321J.2(8)(a), there must be sufficient evidence as could convince a reasonable juror that Boehm drove his vehicle after 10:14 p.m. Boehm testified that he started drinking wine and began monitoring the flooding in his basement at 9:00 p.m. He further testified that he went into his basement three to four times, approximately every fifteen to twenty minutes. Viewing the evidence in a light most favorable to the verdict, as we must, a reasonable juror could thus conclude that Boehm's fourth descent to the basement occurred at 10:00 p.m. At some point in time following this last check, Matte called Boehm asking for assistance. Boehm noted that "twenty minutes at the most" passed before he reached the accident scene where he was eventually arrested. Thus, according to Boehm's own timeline, he could have been driving his vehicle as late as 10:20 p.m., within two hours of time when his breath specimen was drawn.

We conclude sufficient evidence supports the finding that Boehm operated his vehicle within the two-hour period before his breath specimen was drawn.

Accordingly, the State was properly afforded the benefit of the presumption provided under section 321J.2(8)(a). The court properly instructed the jury on the alternative theory that Boehm drove a motor vehicle while having a blood alcohol concentration in excess of .08. We therefore affirm Boehm's conviction.

**AFFIRMED.**