

IN THE COURT OF APPEALS OF IOWA

No. 6-377 / 05-1315

Filed June 14, 2006

STATE OF IOWA,
Plaintiff-Appellant,

vs.

TIMOTHY (NMN) MUELLER,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Mary E. Howes,
Judge.

Timothy Mueller appeals from his conviction for third-offense operating
while intoxicated. **AFFIRMED.**

J.E. Tobey, III, Davenport, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, William E. Davis, County Attorney, and Marc Gellerman and Alan
Havercamp, Assistant County Attorneys, for appellee.

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

EISENHAUER, J.

Timothy Mueller appeals from his conviction for third-offense operating while intoxicated (OWI). He contends there is insufficient evidence to support his conviction. We review his claim for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* “Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt.” *Id.*

Mueller and a friend, Chris Hadasbeck, went to the Stadium Club at approximately 9:00 or 9:30 on the evening of February 20, 2005. Mueller consumed between three and five alcoholic beverages while at the bar. They then proceeded to Rookies, where Mueller consumed another two or three alcoholic beverages. Sometime between 1:30 and 2:00 a.m., they left Rookies and went to another friend’s residence. At trial they claimed they did not drink any alcoholic beverages after leaving Rookies.

At approximately 5:30 a.m., the vehicle Mueller was driving struck a parked vehicle on the side of the street, substantially damaging both vehicles. Officers Robert Welch and Scott Lansing were dispatched to the scene of the collision. Officer Lansing observed that Mueller’s eyes were bloodshot and watery, his breath smelled of alcoholic beverage, his coordination was poor, and his speech was somewhat slurred. Mueller initially claimed he was not the driver of the vehicle, but later admitted he was driving. He told Officer Lansing he had been drinking at Rookies and a friend’s residence until approximately half an hour before the collision. He would not tell the officer how much he had imbibed and refused to perform sobriety tests.

Officer Lansing believed Mueller was intoxicated and arrested him. Mueller refused to submit to chemical testing to determine his blood alcohol content. A trial information charged Mueller with third-offense OWI and driving while revoked. Mueller plead guilty to the charge of driving while revoked.

At trial, Mueller introduced evidence that his tilt wheel mechanism was broken. James Bullock, the body shop manager of Lindquist Ford, opined that the steering mechanism damage was not related to the accident, but had occurred at a prior point in time. He testified the steering mechanism would have made a brittle snapping noise and, at that moment, steering would not have been possible. Mueller testified that as he attempted to make a wide turn into his garage, he heard a loud snapping sound and collided with the parked car.

After the case was submitted, the jury sent a note reading, "Can we consider that Mr. Mueller could have been intoxicated while driving his car after drinking five to eight beers or must we only consider his intoxication at the time of the accident?" The court instructed the jury to re-read the marshalling instructions. Mueller's counsel requested an interrogatory be submitted to determine whether a juror was voting in favor of guilt based on the events occurring prior to 5:30 a.m. on February 21, 2005. The request was denied. Fifteen minutes later the jury returned a guilty verdict.

Mueller contends there is insufficient evidence to convict him of third-offense OWI based on his actions at the time of the collision. He argues his eyes were bloodshot due to being in a smoky place and being up all night. He further argues his coordination was poor because he had been in a forceful collision just moments before. He claims this "is not so outlandish a proposition that a jury

would necessarily reject it.” However, in evaluating the sufficiency of the evidence for jury consideration, we view it in the light most favorable to the verdict. *State v. Acevedo*, 705 N.W.2d 1, 4 (Iowa 2005). Coupled with the odor of alcoholic beverage emanating from Mueller, his slurred speech, his statement that he stopped drinking only a half hour earlier, and his initial claim that he was not driving his vehicle, we conclude a reasonable jury could find Mueller was intoxicated at the time of the collision. Although Mueller claimed at trial he had stopped drinking hours before, this testimony conflicted with his explanation he gave the officer shortly after the collision. The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). Likewise, they were free to reject the argument that the pre-collision break in the steering mechanism suggests he was not intoxicated when the collision occurred.

We further conclude there was substantial evidence by which a reasonable factfinder could conclude Mueller was driving while under the influence of alcohol earlier in the evening. Mueller testified to imbibing between five and eight alcoholic beverages at two bars before going to a friend’s residence. Although there was no direct proof that Mueller drove to the residence, a jury could infer his actions by virtue of the fact that his vehicle was at the friend’s residence. See *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000) (holding we consider not only evidence which supports the verdict, but all reasonable inferences which could be derived from the evidence).

Jurors could consider both Mueller's actions while leaving the bar at approximately 2:00 a.m. and his collision at approximately 5:30 a.m. in determining he was guilty of OWI. The trial information alleged Mueller drove while under the influence of alcohol on February 21, 2005. The jury instructions stated Mueller was guilty of OWI if the jurors found he operated a vehicle on that date while under the influence of an alcoholic beverage. Both incidents occurred on that date. While some jurors may have based their decision on Mueller's act of driving at 2:00 a.m. and some may have based their decision on Mueller's collision, we conclude so doing is not improper. Unanimity of the jury is not required where substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other. *State v. Bratthauer*, 354 N.W.2d 774, 776 (Iowa 1984). At the root of this standard is the principle that the unanimity rule requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. *Id.* This principle implicates a two-step inquiry; the first step is to determine whether the statute defines a single offense that may be committed in more than one way or instead defines multiple offenses. *Id.* When a single offense is defined, the second step is to determine if the alternative modes are consistent with and not repugnant to each other. *Id.* Our supreme court has held the OWI statute defines a single offense committable in alternative ways rather than multiple offenses. *Id.* We conclude the alternatives were not repugnant to each other.

Substantial evidence supports Mueller's conviction. Accordingly, we affirm the jury's conviction of third-offense OWI.

AFFIRMED.