

IN THE COURT OF APPEALS OF IOWA

No. 7-950 / 07-0234
Filed February 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSICA LYNN BALLARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Kirk A. Daily,
Judge.

Jessica Lynn Ballard appeals her convictions for serious injury by vehicle
and possession of marijuana. **AFFIRMED.**

Roman Vald of LaMarca & Landry, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, and Mark Tremmel, County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Jessica Lynn Ballard appeals her convictions for serious injury by vehicle and possession of marijuana. She contends there was not sufficient evidence to support her conviction for serious injury by vehicle; the district court erred in denying her motion in arrest of judgment, because her waiver of jury trial was not knowing, voluntary, and intelligent; and her trial counsel was ineffective for failing to call her father as a witness at trial. We affirm.

The record reveals the following facts. On October 17, 2004, Ballard drove her friend Tiffany Clark to Ballard's uncle's house south of Ottumwa to drink a bottle of vodka given to them by Clark's mother. After drinking a large quantity of the vodka, Ballard and Clark got into an argument. The argument ended when Ballard became sick and vomited in the bathroom, where she remained for approximately forty-five minutes before then passing out in the living room for about an hour. However, when she awoke they began arguing once again.

Sometime after midnight it was decided it would be best for Ballard to take Clark home because they were still arguing. The young women left Ballard's uncle's house and headed back toward Ottumwa with Ballard driving. They continued to argue as Ballard drove Clark home. When they reached the yield sign at the intersection of Highways 63 and 34, Clark opened her door to attempt to get out of the vehicle. As Ballard continued through the intersection Clark aborted her attempt. Ballard then proceeded on Highway 34 with the intent to turn onto Iowa Avenue to take Clark home. When Ballard attempted to turn left

at the intersection of Iowa Avenue and Highway 34 she ran into a guard rail. As a result of the accident Clark split the tissue between her forefinger and thumb, split a bone in her thumb, and broke off part of a bone in her ankle. She had surgery on her thumb to insert two pins to hold the bone together. The injury to her ankle also required surgery to insert a screw.

Ballard testified at trial that Clark was again attempting to get out of the vehicle when they reached the intersection of Iowa Avenue and Highway 34, she reached over to grab Clark to keep her in the vehicle, and this caused her to make her left turn too wide and strike the guard rail. Clark testified she does not remember anything after attempting to get out of the vehicle at the intersection of Highways 63 and 34 until she woke up getting stitches in the hospital. She does not recall her alleged second attempt to get out of the vehicle.

Officer Steven Kovacs of the Ottumwa Police Department investigated the accident. Ballard told Kovacs she was driving the vehicle and attempted to back away and leave the scene after hitting the guard rail. Officer Kovacs noticed that Ballard had left a trail of fluid and drag marks from parts of the vehicle that were hanging on the ground when she had attempted to leave. He testified that both Ballard and Clark had strong odors of alcoholic beverage about them. Kovacs also observed that Ballard had bloodshot watery eyes, Ballard had slurred speech, and there were empty beer cans and liquor bottles in the back of the car. He searched the vehicle before it was towed. In a purse containing Ballard's identification Kovacs found a plastic baggie with a very small amount of what

later testing determined to be marijuana, as well as two pipes used to smoke marijuana that also tested positive for marijuana residue. He also found a marijuana pipe in a purse containing Clark's identification. Ballard admitted to Kovacs that the plastic baggy had contained marijuana and the two pipes were hers, but denied any recent marijuana use, stating the baggie was empty from two weeks earlier.

At the scene Ballard told Officer Kovacs she had drunk three beers, all before 7:00 that evening. She did not tell him she had been drinking vodka to the point of vomiting that evening as well. Later, after being taken to a hospital Ballard told Kovacs she had been flirting with the firefighters at the scene, and asked Officer Kovacs out on a date. Laboratory tests of Ballard's urine indicated an alcohol concentration of .124. Her urine also tested positive for the presence of cannabinoids, the result of marijuana use.

The State charged Ballard, by trial information, with serious injury by vehicle, in violation of Iowa Code section 707.6A(4) (2005) (Count I), and possession of marijuana, in violation of section 124.401(5) (Count II). Ballard filed a written waiver of jury trial. The matter proceeded to a trial to the court and on August 3, 2006, the trial court issued a written ruling finding Ballard guilty as charged.

In its ruling the court found Ballard's testimony concerning how the accident occurred was not credible. Based on the evidence presented at trial the court determined it was reasonable to conclude that a proximate cause of the accident was the fact Ballard was too intoxicated to control her vehicle and thus

that intoxication was a proximate cause of the accident. The trial court further concluded that even if it were to accept Ballard's version of events surrounding the accident, Clark's actions were not a sufficient intervening cause to remove Ballard's intoxication as a proximate cause of Clark's injuries.

After the trial Ballard's attorney withdrew and she retained new counsel. She then filed motions for new trial and in arrest of judgment and two supplemental motions for new trial. In her motions Ballard argued, in relevant part, that the verdict was contrary to the law and the evidence; she did not make a knowing, voluntary, and intelligent waiver of her right to jury trial; and her trial attorney was ineffective for failing to call her father as a witness at trial. A hearing was held on her motions and the trial court entered a written ruling denying the motions. The court sentenced Ballard to a term of incarceration of no more than five years on the serious injury by vehicle conviction and a concurrent term of thirty days on the possession of marijuana conviction.

Ballard appeals, contending the trial court lacked sufficient evidence to convict her of serious injury by vehicle. More specifically, she claims there was insufficient evidence her intoxication was a proximate cause of the injuries suffered by Clark; the court abused its discretion in denying her motion for new trial. because the verdict was contrary to law and against the weight of the evidence; and the court failed to make a specific finding regarding the "serious injury" element of the charge. Ballard further contends the court erred in denying

her motion in arrest of judgment, because her waiver of jury trial was not knowing, voluntary, and intelligent. Finally, she claims her trial counsel was ineffective for failing to call her father as a witness at trial.

II. MERITS.

A. Sufficiency of the Evidence.

Ballard first contends the State failed to prove, and thus the trial court lacked sufficient evidence to find, her intoxication was a proximate cause of Clark's injuries. She claims the trial court abused its discretion in denying her motion for new trial on this ground.

Our scope of review is on assigned error. Iowa R. App. P. 6.4; *State v. Dible*, 538 N.W.2d 267, 270 (Iowa 1995). It is the same on a defendant's appeal from a criminal conviction whether the court or a jury is the factfinder. *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988). "We review a trial court's findings in a jury-waived case as we would a jury verdict: If the verdict is supported by substantial evidence we will affirm." *State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000).

The standard of review in a challenge to the sufficiency of the evidence is well established. *Dible*, 538 N.W.2d at 270. "We will uphold a verdict where substantial evidence in the record tends to support the charge." *Id.* A trial court's finding of guilt is binding on appeal if supported by substantial evidence. Iowa R. App. P. 6.14(6)(a); *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997).

In a criminal case tried to the court, as in a civil case tried to the court at law, the court's verdict is like a jury verdict. Upon review of the sufficiency of evidence to support the verdict, we view the evidence in the light most favorable to the verdict, and we

accept as established all reasonable inferences tending to support it. Findings of the trial court are to be broadly and liberally construed, rather than narrowly or technically, and, in case of ambiguity, we will construe findings to uphold, rather than defeat, the judgment. Direct and circumstantial evidence are equally probative so long as the evidence raises a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture. It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt.

Dible, 538 N.W.2d at 270 (internal quotations and citations omitted). The trial court, as factfinder, is to determine witness credibility and the weight of the evidence as a whole. See *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999). Trial court findings on credibility of witnesses are entitled to considerable deference by this court. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994).

As charged in Count I, in order to convict Ballard of serious injury by vehicle the State had to prove, beyond a reasonable doubt, that (1) on or about October 18, 2004, Ballard either (a) operated a motor vehicle while under the influence of alcohol or a drug or a combination of such substances, or (b) operated a motor vehicle while having an alcohol concentration of .10 or more, or (c) operated a motor vehicle while any amount of a controlled substance was present in her, as measured by her blood or urine; and (2) Ballard's act or acts set out in element (1) unintentionally caused serious injury to Clark. See Iowa Code § 707.6A(4). On appeal Ballard appears to challenge the sufficiency of the evidence only as to the second of these two elements. She contends the State did not prove her intoxication was a proximate cause of the accident because

Clark attempted to jump from her vehicle at the intersection in question and that was an unforeseeable, intervening, and superseding cause that broke the chain of causal connection between Ballard's actions and Clark's injuries.

Clark testified she does not recall opening the passenger-side door and attempting to get out of the car a second time, at the intersection where the accident occurred. Although she initially testified she tried to get out of the car at that intersection, she went on to state she did not remember doing so, but had only been told by Ballard she had done so. Thus, the only evidence Clark attempted to get out of the car a second time is the testimony of Ballard. For the following reasons, we conclude there was sufficient evidence for the trial court to conclude Ballard was intoxicated at the time of the accident, she lied to the police, and her testimony regarding how the accident occurred is not credible.

The evidence shows that Ballard flirted with the firefighters at the scene of the accident, and that at the hospital she asked the arresting officer out on a date. The trial court found her testimony that she was "just joking around" with the firefighters and police was "disingenuous." In addition, Ballard attempted to leave the scene of the accident even though her vehicle was leaking fluids and dragging parts on the ground, and her friend had suffered serious, visible injuries. We agree with the trial court and find that such behavior shows a lack of reasoning and judgment on Ballard's part and is an indication of her level of intoxication at the time of the accident. See *Smith v. Shagnasty's, Inc.*, 688 N.W.2d 67, 72 (Iowa 2004) (A person is "intoxicated" when one or more of the following is found: "(1) the person's reasoning or mental ability has been affected;

(2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions.”). Furthermore, Ballard’s urine sample showed an alcohol concentration of .124 and was positive for marijuana. The fact Ballard was clearly intoxicated by alcohol, and had a controlled substance in her system at the time of the accident, shows her recollection of the events surrounding the accident may not be clear. This in turn brings the credibility of her testimony regarding such events into question.

In addition, Ballard was not truthful with Officer Kovacs about what and how much she had been drinking. She told him she had only three beers earlier in the evening, when in fact she had much more recently been drinking vodka to the point of vomiting and passing out. Although Ballard testified at trial that Clark was attempting to open her door as Ballard was turning the corner and ran into the guard rail, nothing in the record as presented on appeal indicates Ballard presented this version of the facts to Officer Kovacs during his extended contact with and questioning of her on the night of the accident. We also note that a defendant’s “direct interest in the outcome of the hearing” can weigh against the credibility of the defendant’s testimony. See *Missman v. Iowa Dep’t of Transp.*, 653 N.W.2d 363, 367 (Iowa 2002) (citation omitted).

As with any witness testimony at a criminal trial, the trier of fact is free to believe or disbelieve whatever testimony it chooses. See *State v. Trammell*, 458 N.W.2d 862, 863 (Iowa Ct. App. 1990). The court as fact finder could believe some of Ballard’s testimony, all of the testimony, or none of it. *State v. Lopez*,

633 N.W.2d 774, 786 (Iowa 2001). Clearly the trial court did not believe Ballard's version of how the accident occurred. We conclude there is substantial evidence in the record to support the trial court's finding that Ballard's testimony of how the accident occurred was not credible. More specifically, we agree Ballard's contention that Clark's attempt to get out of the vehicle, rather than her own intoxication, was the cause of the accident is not credible. Therefore, based on the evidence set forth above, we conclude there is substantial evidence in the record to support the trial court's conclusion that Ballard's intoxication was a proximate cause of the accident and the resulting injuries to Clark.

Ballard argues, however, that regardless of her intoxication Clark's alleged actions of attempting to get out of the moving vehicle was an intervening act that relieves her of criminal responsibility. A defendant can be relieved of criminal responsibility if an intervening act breaks the chain of causal connection between the defendant's action and the victim's injury or death. *State v. Garcia*, 616 N.W.2d 594, 597 (Iowa 2000). However, for an intervening act to relieve a defendant of such responsibility the intervening act must be the sole proximate cause of the injury or death. *Id.* After concluding Ballard's testimony regarding how the accident occurred was not credible, the trial court went on to conclude that even if it were to accept Ballard's version of events Clark's actions did not rise to the level of an intervening cause to relieve Ballard of her responsibility in this case. The court determined that Ballard's actions of drinking to the point of intoxication before driving, engaging in a heated argument with her friend, and

continuing to drive while Clark attempted to get out of the vehicle, all were substantial factors in the accident.

We agree with the trial court and conclude there is substantial evidence from which a rational trier of fact could find that, even assuming Ballard's version of events is true, Clark's actions of attempting to get out of the vehicle were not an intervening cause sufficient to remove Ballard's legal responsibility for Clark's injuries. Clark's alleged actions, even if a contributing factor to her injuries, were not the *sole* proximate cause of the accident. Because Ballard's intoxication was a contributing factor as well, Clark's actions did not relieve Ballard of criminal responsibility.

Accordingly, we conclude there was sufficient evidence from which a rational factfinder could conclude Ballard is guilty of serious injury by vehicle beyond a reasonable doubt regardless of whether Clark attempted to get out of Ballard's vehicle at the intersection in question.

B. Motion for New Trial.

Ballard also contends the trial court abused its discretion in denying her motion for new trial, because the verdict was contrary to law or evidence. When a defendant argues the trial court erred in denying a motion for new trial based on the claim that the verdict is contrary to the weight of the evidence our standard of review is for abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Iowa Rule of Criminal Procedure 2.24(2)(b)(6) provides that the court may grant a new trial when the verdict is contrary to law or the evidence. Our supreme court has interpreted "contrary to . . . the evidence" as meaning

“contrary to the weight of the evidence.” *Id.* The court made it clear in *Ellis* that the contrary to the weight of the evidence standard is not the same as the sufficiency of the evidence standard, contrary to a previous holding. *Id.* The power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Id.*

We conclude the trial court did not abuse its discretion in denying Ballard’s motion for new trial. This is not a case in which the testimony of a witness or witnesses which otherwise supports conviction is so lacking in credibility that the testimony cannot support a guilty verdict. Neither is it a case in which the evidence supporting a guilty verdict is so scanty, or the evidence opposed to a guilty verdict so compelling, that the verdict can be seen as contrary to the evidence. The evidence in this case simply does not preponderate heavily against the verdict.

C. Serious Injury.

Ballard also claims the court erred in failing to make a specific finding regarding the serious injury element of the charge against her.

A defendant’s stipulation regarding evidence may eliminate the State’s need to marshal proof on an essential element of a crime, but the stipulation does not thereby eliminate the jury’s duty to make a finding beyond a reasonable doubt on each essential element.

State v. Roe, 642 N.W.2d 252, 254-55 (Iowa 2002). Here, the trial court stated that Ballard and the State stipulated that Clark suffered a serious injury as a result of the accident and thus the only fighting issue was whether Clark’s injuries

were proximately caused by Ballard's being under the influence, having an alcohol concentration over .10, or having a controlled substance in her urine. The court did not make a separate, express finding that Clark had suffered a serious injury from the accident. However, the court did note the State's obligation to prove that Ballard's acts "unintentionally caused serious injury to Tiffany Clark." The court did make specific findings regarding the extent of Clark's injuries, including the fact she had to have surgery on her thumb to insert two pins and surgery to place screws in her ankle. The court further found that Ballard attempted to leave the scene of the accident despite the fact Clark had suffered "visible serious injuries."

We accept as established all reasonable inferences tending to support the trial court's verdict. *Dible*, 538 N.W.2d at 270. "Findings of the trial court are to be broadly and liberally construed, rather than narrowly or technically, and, in case of ambiguity, we will construe findings to uphold, rather than defeat, the judgment." *Id.*; *See also Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983) (stating, in the context of a civil action, that if no rule 179(b) (now rule 1.904(2)) motion is made we will assume as fact an unstated finding necessary to support the trial court's judgment and any ambiguity in the trial court's findings is decided in favor of the judgment). Based on the trial court's recitation of "serious injury" as a necessary element of the State's proof, the findings the court made regarding the nature and extent of Clark's injuries, and its statement that Clark had suffered "visible serious injuries," we can reasonably infer that the court in

fact found Clark sustained a serious injury. We find no merit to this claim of trial court error.

D. Waiver of Jury Trial.

Ballard next claims the trial court erred in denying her motion in arrest of judgment, made on the ground her waiver of jury trial was not knowing, voluntary, and intelligent. A trial by jury is required unless the defendant “voluntarily and intelligently waives a jury trial in writing and on the record. . . .” Iowa R. Crim. P. 2.17(1). Rule 2.17(1) “requires the court to conduct an in-court colloquy with defendants who wish to waive their jury trial rights.” *State v. Liddell*, 672 N.W.2d 805, 811-12 (Iowa 2003). The court in *Liddell* found that the “on the record” language from rule 2.17(1) requires some in-court colloquy or personal contact between the court and the defendant, to ensure the defendant's waiver is knowing, voluntary, and intelligent. *Id.* at 812.

Our supreme court has suggested a five-part inquiry that “constitute[s] a sound method by which a court in an in-court colloquy may determine whether a defendant's waiver of his right to a jury trial is knowing, voluntary, and intelligent.” *Id.* at 811.

[T]he court should inquire into the defendant's understanding of the difference between jury and nonjury trials by informing the defendant:

1. Twelve members of the community compose a jury,
2. the defendant may take part in jury selection,
3. jury verdicts must be unanimous, and
4. the court alone decides guilt or innocence if the defendant waives a jury trial.

Importantly, . . . we also urge [] judges to “ascertain whether [the] defendant is under [the] erroneous impression that he or she will be rewarded, by either court or prosecution, for waiving [a] jury trial.”

Id. at 810-11 (quoting *State v. Stallings*, 658 N.W.2d 106, 111 (Iowa 2003) (third through fifth alterations in original). However, the court clarified that these “five subjects of inquiry are not ‘black-letter rules’ nor a ‘checklist’ by which all jury-trial waivers must be strictly judged. . . . The ultimate inquiry remains the same: whether the defendant's waiver is knowing, voluntary, and intelligent.” *Id.* at 814. Thus, substantial compliance with the five-factor inquiry is acceptable. *Id.*

Ballard signed a written waiver of jury trial on April 19, 2006. The waiver acknowledged that Ballard was waiving the right to be tried by a jury of twelve persons, she would no longer help in the selection of the jury, and there would be no requirement that any conviction be based on a unanimous verdict of twelve persons because her case would be decided solely by the court. The trial court also engaged in an in-court colloquy with Ballard prior to trial to confirm her written waiver of jury trial. During the colloquy Ballard again acknowledged that she understood that the waiver of jury trial in her case would mean her case would be decided solely by a judge, that she was waiving her right to have her case presented to twelve jurors, and that if it were tried to a jury the State would be required to prove her guilt beyond a reasonable doubt to all twelve jurors. The court also informed Ballard she was giving up her right to assist in picking a jury. She acknowledged she had discussed all of these waivers with her attorney and believed it was in her best interest to proceed with a trial to the court.

Ballard claims her waiver was not knowing, voluntary and intelligent because the trial court failed to question her on the fifth point mentioned in

Stallings, whether she was under the erroneous impression she would be rewarded for waiving a jury trial. However, as set forth above, our supreme court has clarified that the five subjects of inquiry listed in *Stallings* are neither “black-letter rules” nor a “checklist” by which waivers must be strictly judged, and that substantial compliance with the suggested inquiry is acceptable. *Liddell*, 672 N.W.2d at 814.

We conclude the written waiver signed by Ballard and the in-court colloquy between her and the trial court substantially complied with the requirements for a waiver of jury trial and were sufficient to show that her waiver was knowing, voluntary, and intelligent.

C. Ineffective Assistance of Counsel.

Finally, Ballard contends her trial counsel was ineffective for failing to call her father, Steve Ballard, as a witness at trial to corroborate her testimony about how the accident happened and thereby bolster her credibility.

When there is an alleged denial of constitutional rights, such as ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). An ineffective assistance claim may be disposed of if the defendant fails to prove either of the two prongs of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we need not determine whether counsel's performance is deficient before undertaking the

prejudice determination. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In order to prove prejudice, Ballard must show there is a reasonable probability that but for her counsel's unprofessional errors the result of the proceeding would have been different. *Ledezma v. State*, 626 N.W.2d 134, 143-44 (Iowa 2001).

The affidavit from Ballard's father states, in relevant part, that he spoke with Clark on the telephone about three weeks after the accident and Clark told him she "remembered trying to jump out of my daughter's vehicle." Initially, we note the affidavit does not specify whether Clark was referring to her acknowledged attempt to get out of Ballard's vehicle at the intersection of Highways 63 and 34, or was referring to the second time she allegedly attempted to get out, which Ballard asserts caused the accident. If Clark was referring to her acknowledged action of opening the door at the first intersection, Steve Ballard's proposed testimony would clearly not have added anything to bolster Ballard's testimony. Thus counsel was not ineffective for not calling Steve Ballard to testify on this issue, as not calling him neither breached any essential duty nor prejudiced Ballard's defense.

However, assuming Steve Ballard meant that Clark had told him she opened the door at the intersection where the accident occurred, that he would have testified to that effect, and that because of such testimony the trial court would have found Ballard's version of events to be credible, Ballard nevertheless cannot show she was prejudiced by the absence of Steve Ballard's testimony because she cannot show a reasonable probability it would have changed the outcome of the trial. The trial court concluded, and as set forth above we find

sufficient evidence supports the conclusion, that even assuming Clark did attempt to get out of Ballard's vehicle at the second intersection, thereby causing her to strike the guard rail, Ballard's intoxication was still a contributing factor and thus a proximate cause of the accident. Therefore, even giving full credit to Ballard's version of the events, Clark's action was not the sole proximate cause of the accident and thus was not a sufficient intervening cause to relieve Ballard of legal responsibility.

Accordingly, we conclude Ballard has not meet her burden to prove there is a reasonable probability that but for her trial counsel's alleged error in not calling her father to testify regarding his phone conversation with Clark the outcome of the trial would have been different. Ballard's claim of ineffective assistance of counsel must fail.

IV. CONCLUSION.

For the reasons set forth above, we conclude there was sufficient evidence from which a rational factfinder could find Ballard's testimony of how the accident occurred was not credible. We further conclude that even assuming Ballard's testimony regarding how the accident occurred was credible, a rational factfinder could find Clark's actions were not an intervening cause sufficient to remove Ballard's legal responsibility, because Ballard's intoxication was still a proximate cause of the accident and the resulting injuries to Clark. The court did not abuse its discretion in denying Ballard's motion for new trial, because the verdict was not contrary to the weight of the evidence. We infer that the court in fact found that Clark suffered a serious injury as a result of the accident. We

conclude the court did not err in denying Ballard's motion in arrest of judgment, as her waiver of jury trial was knowing, voluntary, and intelligent. Finally, we conclude Ballard did not meet her burden to show that her trial counsel rendered ineffective assistance by not calling Ballard's father to testify at trial.

AFFIRMED.