

**IN THE COURT OF APPEALS OF IOWA**

No. 9-387 / 08-1560  
Filed June 17, 2009

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

**vs.**

**MELISSA SUE ASHBY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Clarke County, Monty W. Franklin,  
District Associate Judge.

Defendant appeals her conviction, following a bench trial, for operating  
while intoxicated, second offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney  
General, Ronald Wheeler, County Attorney, and Megan Guns, Assistant County  
Attorney, for appellee.

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

**DOYLE, J.**

Melissa Ashby appeals her conviction, following a bench trial, for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2007). She claims there was insufficient evidence to support her conviction and her trial counsel was ineffective in two respects. We affirm Ashby's conviction and preserve her ineffective-assistance-of-counsel claims for a possible postconviction proceeding.

***I. Background Facts and Proceedings.***

An abandoned vehicle was discovered in a ditch in rural Clarke County, Iowa, in the early morning hours of April 20, 2008. Detective Lucas Darby was dispatched to the scene to investigate. He ran the vehicle's license plates and discovered it was owned by Joseph and Darcy Halverson. Detective Darby went to the Halversons' residence and learned Darcy was not home. While Detective Darby was there, Joseph received a telephone call from Darcy. Joseph told the detective she was in a field near the vehicle and scared to come out.

Detective Darby left the Halversons' home. By the time he returned to the scene of the accident, Darcy and her friend, Melissa Ashby, had come out of the field where they had been hiding. Darcy and Ashby had been drinking at a couple of different bars and a friend's house earlier that night. Both women were wet and muddy with bloodshot, watery eyes and smelled of alcohol. Ashby, who had blood on her face, told Detective Darby that she had been driving the vehicle when it went into the ditch.

Based on that information, the detective asked Ashby to perform some field sobriety tests. After failing the horizontal gaze nystagmus and walk-and-turn

tests, Ashby asked Detective Darby why she was being asked to do the tests. The detective responded, "Because you told me you were driving." He asked her if that was correct, and she said, "Yes, that's fine." Detective Darby replied, "Yes, that's fine, you were driving?" and Ashby said yes. He then administered the one-leg stand test, which she also failed. Ashby refused to submit to a preliminary breath test, and she was arrested.

Ashby waived her right to a jury trial, and a bench trial was held. At trial Ashby testified Darcy was driving the car when it went into the ditch. She denied telling Detective Darby she had been driving the car. She testified that although the detective asked her if she had been drinking, he did not ask her if she had been driving. The district court found the testimony of Detective Darby to be more credible than Ashby's and entered a ruling finding her guilty of OWI, second offense. Ashby appeals.

## ***II. Discussion.***

### ***A. Sufficiency of the Evidence.***

The first issue presented to us on appeal is whether there is sufficient evidence to support Ashby's conviction. Sufficiency-of-the-evidence challenges are reviewed for correction of errors at law. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). The district court's finding of guilt is binding on appeal if supported by substantial evidence. *Id.* Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of the evidence, we view the record in a light most favorable to the State, including legitimate inferences and

presumptions that may fairly and reasonably be deduced from the evidence. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005).

The offense of operating a motor vehicle while intoxicated, second offense, consists of three essential elements: (1) the operation of a motor vehicle (2) while under the influence of alcohol (3) with a previous OWI conviction within the last twelve years. See Iowa Code § 321J.2; *State v. Boleyn*, 547 N.W.2d 202, 204 (Iowa 1996). Ashby claims there is insufficient evidence to prove she was operating the motor vehicle.<sup>1</sup> Although this is a close case, we believe substantial evidence supports the district court's finding of guilt.

"The operation of a motor vehicle by a defendant charged with operating while intoxicated may be established by circumstantial evidence as well as direct evidence." *Boleyn*, 547 N.W.2d at 205. "Circumstantial and direct evidence are equally probative." *Id.*

Detective Darby testified that Ashby admitted to him twice at the scene of the accident that she was driving the vehicle. In *State v. Sharpshair*, 215 Iowa 399, 401, 245 N.W. 350, 351 (1932), our supreme court stated

[i]t was proper and sufficient to establish the identity of appellant, as the driver of the car, by his admissions made out of court, exactly as it is proper and sufficient to establish the identity of any defendant as the perpetrator of a proved act by such admissions.

See also *State v. Hiatt*, 231 Iowa 499, 506-07, 1 N.W.2d 664, 668 (1942) (upholding OWI conviction where defendant admitted at the scene of the accident that he had been driving and no other person was seen near the car or with the defendant). Although Ashby denied telling the detective that she had

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<sup>1</sup> She does not challenge the existence of the other two elements on appeal.

been driving the vehicle and testified instead that Darcy was driving when the accident occurred, it is the role of the fact-finder, not the appellate courts, to determine the credibility of witnesses and resolve any conflicts in the evidence. See *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998); *Boleyn*, 547 N.W.2d at 206.

“We grant considerable deference to the district court’s findings on the credibility of witnesses.”<sup>2</sup> *Boleyn*, 547 N.W.2d at 206. We believe the court, as the finder of fact in this case, acted within its province in rejecting Ashby’s “delinquent and self-serving claim” at trial that she was not driving the vehicle. *Id.* As the court noted, Detective Darby’s actions in investigating the accident were consistent with his testimony that Ashby admitted she was the driver:

As [Detective Darby] testified, in a typical situation he would have assumed that the owner of the vehicle was also the driver of the vehicle. In this case, the vehicle in question was owned by Darcy Halverson and he had initially assumed that she was the driver of the vehicle, which is confirmed by the Deputy searching for Darcy at her home after finding no one at the scene of the accident.

Therefore, something would have [had to] taken place to change that assumption. If the Defendant had not told Deputy Darby that she was the driver of the vehicle, Deputy Darby would have certainly continued with the assumption that Darcy Halverson, as owner of the vehicle, would have been driving the vehicle. Accordingly, it is only logical that Deputy Darby’s attention shifted from Darcy Halverson to the Defendant only as a result of the Defendant’s admission that she was the driver of the vehicle at the time of the accident.

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<sup>2</sup> We decline to ignore the court’s credibility determinations, as Ashby urges we should, due to its supposed reliance on matters outside the record. See *State v. Blanford*, 306 N.W.2d 93, 98 (Iowa 1981) (stating although it is always error to consider facts not in evidence, it is not always reversible error).

Furthermore, Detective Darby testified Darcy told him at the scene of the accident “that the reason that [Ashby] drove in the ditch is because her attention was on Darcy because she was arguing with Joseph on the telephone.”

Upon considering the evidence in the light most favorable to the State, we find enough evidence—barely—to support the district court’s conclusion that Ashby was driving the vehicle at the time of the accident. See, e.g., *Boleyn*, 547 N.W.2d at 206 (upholding OWI conviction where defendant was found asleep in the driver’s seat of his vehicle and admitted driving to the location where he was found, despite later denial at trial that he had driven the vehicle); *State v. Creighton*, 201 N.W.2d 471, 473 (Iowa 1972) (finding sufficient evidence to identify defendant as the driver of the vehicle in an OWI case in which defendant was wandering around in the center of the highway with a head injury and admitted he wrecked his car); *Sharpshair*, 215 Iowa at 401, 245 N.W. at 351 (affirming OWI conviction where defendant and his wife admitted to officers at the scene that defendant had been driving the couple’s stalled vehicle, notwithstanding their subsequent denials at trial).

***B. Ineffective Assistance of Counsel.***

Ashby next claims her trial counsel was ineffective in two respects: (1) failing to raise a hearsay objection to Detective Darby’s testimony that Darcy told him Ashby drove the vehicle into the ditch and (2) failing to file a post-trial motion regarding references by the district court to Ashby’s post-arrest silence in its ruling finding her guilty of OWI, second offense.

We generally do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Rather, we

prefer to preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims. *Id.* We accordingly preserve both of Ashby's ineffective-assistance-of-counsel claims for possible postconviction proceedings.

***III. Conclusion.***

We find substantial evidence supports the district court's determination that Ashby operated a motor vehicle while intoxicated. Her conviction for OWI, second offense, is accordingly affirmed, and her ineffective-assistance-of-counsel claims are preserved for a possible postconviction proceeding.

**AFFIRMED.**