FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-548 / 89-1354

435

STATE OF IOWA,

Appellee,

vs.

THOMAS GILBERT YOKE,

Appellant.

Appeal from the Iowa District Court for Scott County, Douglas M. McDonald, Judge.

The defendant appeals his conviction, following a jury trial, for operating while intoxicated, third offense. **AFFIRMED.**

Robert J. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Mark Joel Zbieroski, Assistant Attorney General, William E. Davis, County Attorney, and Michael J. Walton, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

A pickup truck owned by Thomas Yoke struck two parked cars. At the time of the accident, Yoke was allegedly a passenger in the truck, with one of his employees behind the wheel. They had apparently just left a bar, at which Yoke admitted having three beers.

After the accident, the driver of the truck departed on foot. Yoke allegedly sat in the truck for a few minutes and then slid over into the driver's seat and drove the few blocks to his home. Bystanders reported Yoke grinned and waved as he drove away, he appeared dazed, he failed to close the pickup's door before driving away, and he failed to retrieve a bath tub which fell out of the rear of the truck when the accident occurred.

Upon reaching his home a few blocks away, Yoke claims he opened a magnum of wine and drank all of it in just a few minutes.

When a police officer arrived at Yoke's home to investigate the accident, Yoke showed signs of intoxication. Yoke was taken to the police station, where an intoxilyzer test showed an alcohol concentration of 0.30.

Yoke was charged with operating a motor vehicle while intoxicated, third offense. A jury found him guilty of that charge, and he has appealed the resulting conviction.

Yoke challenges the sufficiency of the evidence to prove he was intoxicated at the time he drove the truck home after the accident. He asserts he did not become intoxicated until he reached his home. To explain his behavior at the accident scene, he suggests he was dazed or stunned by a blow to the head suffered during the accident.

Yoke also contends his trial attorney rendered ineffective assistance in three respects. He complains the attorney failed to challenge the qualifications of a State's expert on the intoxilyzer machine, failed to call any expert witnesses for the defense, and failed to object to an allegedly prejudicial remark made by the judge. The judge said to Yoke's attorney, "Mr. Schwartz, I would appreciate it if you would be back on time." Yoke argues this remark prejudiced him because it suggested his attorney was incompetent and the trial was a waste of time.

Our review on appeal is limited to assigned errors of law. Iowa R. App. P. 4. We are bound by the trial court's findings of fact if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

This case was tried to a jury. The defendant had ample opportunity to present witnesses and testimony in his favor. We determine the jury's verdict is supported by substantial evidence in the record.

Yoke testified he drank 40 to 42 ounces of Asti spumante in twenty minutes. A police officer testified he arrived at Yoke's residence only nine minutes after Yoke's

arrival. The jury was free to accept or reject either version of events. Either way, substantial evidence exists supporting the jury's verdict Yoke was intoxicated as he drove away from the accident.

Yoke also claims ineffective assistance of counsel in presenting his defense and cross-examining the State's witnesses. Our review of ineffective assistance of counsel claims is de novo of the totality of the circumstances. See State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981). The defendant must affirmatively show by a preponderance of the evidence: 1) counsel failed to perform an essential duty and 2) actual prejudice resulted therefrom, depriving defendant of a fair trial. State v. Yaw, 398 N.W.2d 803, 804-05 (Iowa 1987).

Upon a review of the record in this case, we determine Yoke has failed to satisfy the second prong of this test. See State v. Taylor, 352 N.W.2d 683, 685 (Iowa 1984) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The evidence appears strong enough to justify a jury verdict of guilty even if defense counsel had proceeded as Yoke contends he should have. We make no finding of the first prong as to whether counsel failed to perform an essential duty.

We affirm the trial court on all issues.

AFFIRMED.