

IN THE COURT OF APPEALS OF IOWA

MAY 30 1980

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CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed May 30, 1980

vs.

)

JOE A. BUTLER,

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0-123

63787

Defendant-Appellant.

)

Appeal from Scott District Court - Jack F. Broderick, Judge.

Defendant appeals conviction for operating a motor vehicle while under the influence of an alcoholic beverage in violation of section 321.281, the Code 1977.
AFFIRMED.

Douglas E. Johnston of Muscatine, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; and Lona Hansen, Assistant Attorney General; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals his conviction for operating a motor vehicle while under the influence of an alcoholic beverage in violation of section 321.281, The Code 1977. He raises two issues on appeal: (1) whether his motion for directed verdict should have been sustained, and (2) whether the giving of trial court's instruction number nine, defining the term "operate" was reversible error. We consider these issues separately.

I. Defendant's argument that he should have had a directed verdict seeks to raise the issue of whether he could have been convicted as a result of being in control of a motor vehicle which had become so lodged in the ditch that it could not be driven. We need not determine this issue which relates to defendant's conduct after the car allegedly became immobilized. This is because the evidence of defendant's actions prior to his driving off the traveled portion of the roadway would sustain his guilt of the offense charged for conduct occurring before the alleged immobilization of his vehicle occurred. Stated somewhat differently, the jury could have found from the evidence that defendant was driving on the highway while under the influence of an alcoholic beverage before the car went in the ditch. The motion for directed verdict was properly overruled.

II. We next consider defendant's claim of error with respect to that part of instruction number nine which states: "The term 'operate' as used in these instructions means to have the immediate, actual physical control over the operating mechanism of a motor vehicle that is in operation or has its engine running." Defendant claims that this instruction permits the jury to convict him for conduct occurring after the motor vehicle became immobilized. Initially, we note our belief that it is highly unlikely that the jury convicted defendant for conduct occurring after the vehicle became immobilized. As noted in the prior division of this decision, there was evidence that defendant could have been under the influence during the trip which ended in his car going off the traveled portion of the roadway.

On the merits of defendant's claim, we believe that in view of the definition contained in sections 321.1(42), (48), The Code, the proscriptions of section 321.281 did not cease when he went off the traveled portion of the roadway or when the vehicle became lodged in the snow. We conclude the trial court's instruction is consistent with the concept of "operating" approved in State v. Webb, 202 Iowa 633, 210 N.W. 751 (1926) and State v. Overbay, 201 Iowa 758, 206 N.W. 634 (1925).

The purpose of the statute is to protect against possible results. An automobile lodged in the snow may well become dislodged in certain instances by the actions of the operator alone. Juries should not be required to speculate on the possibility of this occurring in a particular instance.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.