FILED
FEB 23 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed February 23, 1983
vs.)
JACK LEE CARMER,) 2-393/68070
Defendant-Appellant.)

Appeal from Jasper District Court - Thomas Mott, Judge.

Defendant appeals from his conviction for driving while his license was under suspension in violation of Iowa Code section 321A.32(1). AFFIRMED.

Richard E. H. Phelps II , Newton, for defendant-appellant.

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

Considered en banc.

DONIELSON, J.

Defendant appeals from his conviction for driving while his license was under suspension in violation of Iowa Code section 321A.32(1). On appeal he asserts that the evidence was insufficient to show that he operated a motor vehicle during the period of his license suspension. We affirm.

Our scope of review is on assigned errors at law. Iowa R. App. P. 4.

I.

On October 31, 1981, a police officer in Kellogg, Iowa, drove through the parking lot of a Casey's grocery store and noticed someone inside dart behind the store counter as he drove by. The officer got the license plate number of the Rambler automobile which was in the parking lot and ran a check on it. It was registered to a woman whose surname was Carmer. The officer notified another, Officer Barr, that the person in the Casey's store appeared to be suspicious and requested Officer Barr to investigate in his unmarked car. When Officer Barr approached the Casey's store, the Rambler was being driven from the parking lot at a fast rate of speed. Officer Barr pursued the Rambler for quite some time with the red light flashing on top of the officer's dash. The high speed chase continued until the Rambler was driven down a dead end road near an interstate. By the time Officer Barr reached the car, the door on the driver's side was open and no one was in the car. Other officers were summoned to search for the driver of the car near the interstate highway. During the chase, the officers were informed by the Grinnell police that they had been engaged in a high speed chase with defendant, Jack Carmer, earlier that same evening and had a warrant for his arrest. Shortly after the Rambler was found abandoned, the defendant was arrested by deputies of the Sheriff's department, who found defendant walking by the interstate. Defendant's drivers license was under suspension.

When defendant was taken to the police station he told Officer Goss that he

had been at the Casey's store and had been in the Rambler lying down in the back seat held at gunpoint by a person he knew only as Brian. No other evidence was introduced connecting defendant to the Rambler.

After trial by jury, defendant moved for a directed verdict on the ground of insufficiency of the evidence to support the charge. The motion was overruled. He was convicted of driving while his license was suspended and this appeal followed.

II.

Defendant's only contention is that there is insufficient evidence from which a rational jury could find beyond a reasonable doubt that the defendant was driving the Rambler. The review governing this type of challenge was recently articulated in State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981), as follows:

> In reviewing a motion for a directed verdict based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State. All of the evidence must be considered, State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980), and all legitimate inferences that may be deducted therefrom will be accepted. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d at 339.

We believe, on the record before us, there is sufficient evidence to support the conviction.

In testing evidentiary sufficiency direct and circumstantial evidence are equally probative. State v. Schrier, 300 N.W.2d at 308. Here there was sufficient circumstantial evidence that defendant was the driver of the Rambler. His statements admitting that he was in the store and in the car did not amount to a confession, but only "an acknowledgement of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only to establish

the ultimate fact of guilt." State v. Olson, 149 N.W.2d 132, 136 (Iowa 1967). As such, his statements are admissible as evidence and must be considered together with the other circumstantial evidence supporting the charge.

Defendant's statements connected him to the car. The silhouette of only one person was observed by the officers during the chase. The car was abandoned only 45 seconds before the officers arrived and only one door—on the driver's side of the car—was left open. Defendant was found in the vicinity a short time later, walking along the interstate. Defendant's surname is the same as the surname on the car registration. Further, defendant did not know the surname of the man, Brian, who allegedly held him at gunpoint in the back seat of the car. If defendant had been held at gunpoint, it is hard to understand why defendant would have fled to avoid the police who could rescue him from his peril. The Iowa Supreme Court has recognized that one who flees to avoid apprehension "might be more apt to be guilty than one who does not." State v. Barr, 259 N.W.2d 841, 842 (Iowa 1977); see also Sibron v. New York, 392 U.S. 40, 66-67, 88 S. Ct. 1889, 1904, 20 L. Ed. 2d 917, 937 (1968) (flight of suspect at the approach of strangers or law officers are indicia of mens rea and are proper factors to be considered in the decision to make an arrest). It is the jury's duty to judge the defendant's credibility and to determine whether he was, in fact, held at gunpoint in the back seat of the car. See State v. Robinson, 288 N.W.2d at 341. We believe the jury has done so in the instant case, having found that the defendant was the driver of the Rambler. Viewing the record in the light most favorable to the State, we find there is sufficient circumstantial evidence to support the jury's finding. We thus affirm the conviction.

AFFIRMED.

All judges concur, except Schlegel, J., who dissents.

SCHLEGEL, J. (dissenting)

I dissent. The record contains absolutely no evidence that defendant was the driver of the Rambler. The State's case is based entirely on circumstantial evidence. While that fact alone is admittedly insufficient to help defendant here, "any evidence, circumstantial or direct, must be sufficient to raise a fair inference of guilt. It must generate something more than suspicion, or speculation, or conjecture." State v. Myers, 253 Iowa 271, 274, 111 N.W.2d 660, 662 (1961); see also State v. Hooper, 222 Iowa 481, 269 N.W. 431 (1936). The evidence adduced by the State raises no more than a suspicion that defendant might have driven the Rambler. This is not enough to sustain his conviction. Defendant's motion for directed verdict of acquittal should have been sustained.