FILED
JAN 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DENNIS EUGENE THORP,)
Defendant-Appellant.)

Filed January 30, 1981

0-364
64705

Appeal from Black Hawk District Court - Robert E. Mahon, Judge.

Defendant appeals from his conviction for OMVUI, contending that the trial court erred in allowing certain testimony by an expert witness and in giving a particular instruction. AFFIRMED.

John W. Ackerman of Ackerman & Shinkle, Cedar Falls, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Merle Wilna Fleming, Assistant Attorney General, and David Correll, Black Hawk County Attorney, for plaintiff-appellee.

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

DONIELSON, J.

Defendant Dennis Thorp appeals from his conviction of operating a motor vehicle while under the influence of alcohol (OMVUI) in violation of section 321.281, The Code 1979. He contends that the trial court erred in allowing certain testimony by an expert witness and in giving a particular jury instruction. We affirm the conviction.

I.

Following a jury trial in December of 1979, the defendant was convicted of OMVUI and sentenced to one day in jail, a $300 fine, and suspension of his license. At trial, the State presented an expert witness to testify to the effects of alcohol on the body. The defendant objected when the prosecutor asked the witness "whether or not a person with a blood alcohol level of .198 would be under the influence of an intoxicating beverage." The objection was overruled and the witness answered, "I would say very definitely under the influence, yes." At the close of the evidence, when the court presented counsel with proposed jury instructions, the defendant objected to an instruction dealing with the statutory presumption of intoxication arising from a blood alcohol level above .100 per cent, contending that the instruction shifted the burden of proof to the defendant. The court then modified the instruction to emphasize that the presumption was not mandatory, but the defendant objected again on the same ground and the objection was overruled.

II.

Defendant first contends that it was error to admit testimony by the State's expert witness to the effect that in his opinion, a person with a blood alcohol level of .198 per cent is "very definitely" under the influence of alcohol. The defendant objected to the question that produced this response on the grounds that it "calls for opinion of the witness which invades the province of the jury" and "[t]hat's what the jury is to decide." The Iowa Supreme Court has repeatedly held that such an objection lacks the specificity necessary to preserve error. State v. Burrell, 255 N.W.2d 119, 123 (Iowa 1977); State v. Sheridan, 247 N.W.2d 232, 235-36 (Iowa 1976); State v. Hines, 223 N.W.2d 190, 192 (Iowa 1974). We therefore do not review defendant's contention.

III.

Defendant next contends that the trial court erred in overruling his objection to the jury instruction dealing with the statutory presumption of intoxication arising from a blood alcohol level above .100 per cent. Defendant argues that the instruction, which

uses the term "presumptive evidence," has the effect of shifting the burden of proof to the defendant. We disagree.

The challenged instruction in its final form reads as follows:

> The law of Iowa states that for the purposes of determining whether a person was under the influence of an alcoholic beverage while operating a motor vehicle, evidence that there was, at the time, more than ten hundredths of one percentum by weight of alcohol in his/her blood shall be admitted as presumptive evidence that the Defendant was under the influence of an alcoholic beverage.
>
> You are instructed that under the above-stated law, if you find that the State has proven beyond a reasonable doubt that the Defendant, at the time in question, had more than ten hundredths of one percentum by weight of alcohol in his/her blood, then you are permitted but not required to infer from this fact that the Defendant was under the influence of an alcoholic beverage.
>
> Such inference if drawn is not binding or conclusive upon you but it is your duty from all the evidence and the facts and circumstances of the case to determine the questions of fact submitted to you.
>
> Such an inference does not relieve the State of the burden of proving beyond a reasonable doubt that the Defendant was under the influence of an alcoholic beverage. Nor does it place any burden upon the Defendant to prove that he was not under the influence of an alcoholic beverage.

Although the words "presumptive evidence" are used in the first paragraph, it is clear from the remaining paragraphs that the presumption of intoxication is not mandatory and does not shift to the defendant the burden to prove his innocence. It becomes even more clear that the presumption of intoxication is non-mandatory when this instruction is read in the context of the remaining instructions, which emphasize to the jury that the burden of proof is on the State, that the defendant is presumed innocent, and that the defendant's guilt must be established beyond a reasonable doubt before a conviction can be obtained. Instructions are to be read together. State v. Pierce, 287 N.W.2d 570, 575 (Iowa 1980); State v. Johnson, 243 N.W.2d 598, 604 (Iowa 1976). Whether a defendant's constitutional rights have been violated depends upon the way in which a reasonable juror could have interpreted the instruction. State v. Rinehart, 283 N.W.2d 319, 322 (Iowa 1979) (quoting Sandstrom v. Montana, 442 U.S. 510, 514, 99 S. Ct. 2450, 2454, 61 L. Ed. 2d 39, 45 (1979) (emphasis in original)). The trial court was very careful to emphasize that the presumption of intoxication is not mandatory and we fail to see how a reasonable juror could have been misled in the way defendant suggests. Nor does the mere presence of the term "presumptive evidence" invalidate the instruction, since

a presumption can be either permissible or mandatory. Rinehart, 283 N.W.2d at 321. Defendant's challenge to the instruction is totally lacking in merit and, failing to detect error on the part of the trial court, we affirm the conviction.

AFFIRMED.