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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff - Appellee	)	Filed August 9, 1979
vs.	)	
LESTER DALE HENDRICKSON,	)	<u>144</u>
Defendant - Appellant.	)	61235

Appeal from Fremont District Court - Jerry L. Larsen, Judge.

Defendant appeals his O.M.V.U.I. conviction in violation of section 321.281, The Code 1977, alleging insufficient evidence to support the charge, police misconduct, and error in the trial court's denial of his motion for a new trial. - Affirmed.

Edwin A. Getscher, of Getscher & Getscher, Hamburg, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Selwyn L. Dallyn, Assistant Attorney General, and Richard Maher, Fremont County Attorney, for Appellee.

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

PER CURIAM

Defendant appeals his conviction of operating a motor vehicle while intoxicated in violation of section 321.281, The Code 1977, alleging insufficient evidence to support the charge, police misconduct encouraging defendant to commit the crime, and error on the part of the trial court in denying his motion for a new trial based on newly discovered evidence. We affirm.

I. Defendant in his appellate brief fails to cite authority for any of his propositions. Failure to cite authority in support of an issue may be deemed a waiver of that issue. State v. Potts, 240 N.W.2d 654, 656 (Iowa 1976); State v. King, 225 N.W.2d 337, 343 (Iowa 1975); Iowa R. App. P. 14(a)(3). Nonetheless, our review of the record shows that defendant's contentions are without merit.

II. Defendant admits that he was intoxicated but contends that the evidence was insufficient to prove he was operating a motor vehicle while intoxicated. We review the evidence in the light most favorable to the State and every legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). The testimony of Tom Miller that he saw defendant drive his vehicle while intoxicated, accompanied by other testimony that defendant was found intoxicated and alone behind the steering wheel of his pick-up, which was stopped on the side of the highway, was sufficient to support the O.M.V.U.I. charge against defendant.

III. Defendant's contention that police misconduct instigated his criminal behavior is totally without merit, especially since the person the defendant claimed acted improperly, is not a police officer and had no connections with the police department. Furthermore, this issue, which was not adequately raised by defendant's requested instruction, was not brought to the attention of the court below and cannot be raised for the first time on appeal. State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978).

IV. Defendant's motion for a new trial on the basis of newly discovered evidence was untimely filed. State v. Carter, 158 N.W.2d 651, 654 (Iowa 1968); § 787.2, The Code 1977. Furthermore, this motion could not be upheld on the non-statutory ground of lack of a fair and impartial trial, Carter, 158 N.W.2d at 654, when the new evidence was discovered before, not after, trial; when the witness's testimony could have, in the

exercise of due diligence, been presented at trial; and when it is not probable that this witness's testimony would change the result on retrial. Overstreet, 243 N.W.2d at 886. The trial court did not abuse its discretion in denying the motion.

AFFIRMED.