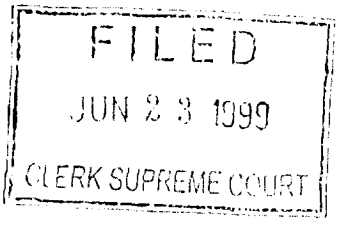
IN THE COURT OF APPEALS OF IOWA

No. 1999-78 (9-265) / 98-1111
Filed June 23, 1999



STATE OF IOWA,
Appellee,

vs.

ROBERT ALLEN JOLLEY,
Appellant.

Appeal from the Iowa District Court for Mahaska County, Michael R. Stewart, Judge.

Robert Jolley appeals his conviction for giving or otherwise supplying alcoholic beverage or beer to a person under the legal age. **AFFIRMED.**

Joel D. Yates of the Clements Law Firm, Oskaloosa, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, Charles A. Stream, County Attorney, and Vernon G. Stejskal, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Robert Jolley appeals his conviction for giving or otherwise supplying alcoholic beverage or beer to a person under the legal age. We affirm.

Background facts. In the early morning hours of August 22, 1997, a Mahaska County deputy stopped Jolley's vehicle. The deputy both smelled and observed alcohol in the vehicle. Jolley and three of his four passengers agreed to submit to a preliminary breath test. Jolley, age twenty-two at the time, tested positive for alcohol, but below .01. Two of his passengers, Sara Fesler, then age fifteen, and Travis Cutler, then age seventeen, also tested positive for alcohol. Jason Rofer, then age sixteen, tested negative, and a man who identified himself as Mike Fesler refused to take a breath test.[1]

Jolley was eventually charged with giving or otherwise supplying alcoholic beverage or beer to a person under the legal age in violation of Iowa Code sections 123.47(1) and 123.47 (4) (1997). Trial commenced in April of 1998. At the close of the State's evidence, Jolley moved for a judgment of acquittal. The district court denied his motion, and the jury found Jolley guilty as charged. Jolley now appeals.

I. Sufficiency of the evidence. Jolley asserts that the district court erred in denying his motion for judgment of acquittal, arguing that the State failed to prove that he gave or otherwise supplied alcohol to a minor.

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[1] This individual was later identified by witnesses as Nick Holt; however, his identity and age remained in dispute at trial.

Our standard of review is for errors at law. Iowa R. App. P. 4. We are bound by the jury verdict unless the verdict is not supported by substantial evidence. *State v. Lewis*, 514 N.W.2d 63, 65-66 (Iowa 1994). In making this determination, we must consider all the evidence in the light most favorable to the State. *State v. Peck*, 539 N.W.2d 170, 172 (Iowa 1995). We accept all legitimate inferences that may fairly and reasonably be deducted from the evidence. *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* Direct and circumstantial evidence are equally probative; however, evidence which merely raises suspicion, speculation, or conjecture is insufficient. *See Id.*

Jolley moved for a judgment of acquittal at the close of the State's case. At oral argument, Jolley asserted that we may consider only the evidence which was in the record up to that point to determine whether the court erred in denying the motion. We disagree and will consider *all* of the evidence in the record. *See State v. Holderness*, 293 N.W.2d 226, 230 (Iowa 1980) (recognizing that while some jurisdictions hold otherwise, there would be "an artificial situation if a court had to close its eyes to part of the evidence which was in fact introduced."); *see also State v. Miles*, 346 N.W.2d 517, 519-20 (Iowa 1984). Jolley proceeded to present evidence in his defense.

Pursuant to Iowa Code section 123.47(1) (1997), the State had the burden to show that Jolley sold, gave, or otherwise supplied alcohol to a person under the legal

age, or aided and abetted another in committing the same.[2] At trial, the State called only two witnesses: the deputy who stopped the car, and Sara Fesler, one of the underage passengers in Jolley's vehicle. The defense called Travis Cutler, another underage passenger. Jolley did not testify.

Fesler testified that Jolley had driven her and their companions to a rock quarry in the country where she had consumed alcohol. She further testified that the alcohol had been transported to the quarry in the back of Jolley's vehicle, but stated that she did not know who had purchased the alcohol. Cutler testified that Jolley drove the group to two different stores on the way out to the quarry, where Nick Holt purchased either two eighteen-packs or two twenty-four packs of Budweiser, and a half-gallon of Black Velvet. Cutler also testified that he began drinking alcohol in Jolley's car before they got to the quarry. Although Fesler and Cutler denied that Jolley had encouraged them to drink, both admitted that Jolley knew neither of them were of legal age.

While knowledge and proximity standing alone are not enough to prove aiding and abetting, proof of the same in addition to circumstantial evidence such as

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[2] The jury was also given an aiding and abetting instruction which provided, in part:

> "Aid and Abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the Defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."

presence, companionship, and conduct before and after the offense is committed, may be sufficient to support an inference that a person participated in the offenses. *See State v. Vesey*, 241 N.W.2d 888, 891 (Iowa 1976); *State v. Pearson*, 547 N.W.2d 236, 240 (Iowa App. 1996).

While there was no testimony that Jolley knew alcohol was being purchased in order to supply it to underage persons, he actively participated in the offense by driving the group to the stores to purchase the alcohol and driving them out to the quarry. The alcohol was consumed both en route and at the quarry. After reviewing the record, we find substantial evidence to support that Jolley aided and abetted another in giving or otherwise supplying alcohol to a minor. The trial court correctly denied the motion for judgment of acquittal.

Having considered all issues properly before us on appeal, we hereby affirm the conviction and sentence of Robert Jolley.

AFFIRMED.

SUMMARY OF DECISIONS, IOWA COURT OF APPEALS

JUNE 23, 1999

Pursuant to Iowa Supreme Court Rule 10(f), as amended March 3, 1981, an unpublished opinion of the Iowa Court of Appeals may not be cited by a court or by a party in any other action or proceeding except when the opinion establishes the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

NOTE: Copies of these opinions may be obtained from the Clerk of the Supreme Court, State Capitol, Des Moines, IA, 50319, for a fee of forty cents per page.

No. 98-1111. [1999-78 (9-265)] STATE v. JOLLEY

Appeal from the Iowa District Court for Mahaska County, Michael R. Stewart, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel and Zimmer, JJ. Opinion by Vogel, J. (5 pages $2.00)

In the early morning hours of August 22, 1997, a Mahaska County deputy stopped Robert Jolley's vehicle. The deputy both smelled and observed alcohol in the vehicle. Jolley, age twenty-two at the time, tested positive for alcohol, but below .01. Two of his passengers, Sara Fesler, then age fifteen, and Travis Cutler, then age seventeen, also tested positive for alcohol. Jolley was eventually charged and convicted for giving or otherwise supplying alcoholic beverage or beer to a person under the legal age. **OPINION HOLDS:** ***I. Sufficiency of the evidence.*** Jolley asserts that the district court erred in overruling his motion for judgment of acquittal. Pursuant to Iowa Code section 123.47(1) (1997), the State had the burden to show that Jolley sold, gave, or otherwise supplied alcohol to a person under the legal age, or aided and abetted another in committing the same. Fesler testified that Jolley had driven her and their companions to a rock quarry in the country where she had consumed alcohol. She further testified that the alcohol had been transported to the quarry in the back of Jolley's vehicle, but stated that she did not know who had purchased the alcohol. Cutler testified that Jolley drove the group to two different stores on the way out to the quarry, where another person purchased either two eighteen-packs or two twenty-four packs of Budweiser, and a half-gallon of Black Velvet. Cutler also testified that he began drinking alcohol in Jolley's car before they got to the quarry. Although Fesler and Cutler denied that Jolley had encouraged them to drink, both admitted that Jolley knew neither of them were of legal age. While knowledge and proximity standing alone are not enough to prove aiding and abetting, proof of the same in addition to circumstantial evidence such as presence, companionship, and conduct before and after the offense is committed, may be sufficient to support an inference that a person participated in the offenses. Although there was no testimony that Jolley knew alcohol was being purchased in order to supply it to underage

persons, he actively participated in the offense by driving the group to the stores to purchase the alcohol and driving them out to the quarry. After reviewing the record, we find substantial evidence to support that Jolley aided and abetted another in giving or otherwise supplying alcohol to a minor. The trial court correctly denied the motion for judgment of acquittal.