IN THE COURT OF APPEALS OF IOWA

No. 7-204 / 96-201

000403

STATE OF IOWA,

Appellee,

vs.

MARK E. WILSON,

Appellant.

FILED
AUG 22 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, District Associate Judge.

Mark E. Wilson appeals from the judgment and sentence entered upon his conviction for operating a motor vehicle while under the influence of alcohol. **AFFIRMED.**

Dennis A. Bjorklund, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, J. Patrick White, County Attorney, and Richard D. Westphal, Assistant County Attorney, for appellee.

Considered by Habhab, C.J., and Cady, and Streit, JJ.

CADY, J.

Mark Wilson appeals from a judgment and sentence entered by the district court following his conviction for second offense operating while intoxicated. He claims there was insufficient evidence to support the conviction, the trial court erred in admitting certain evidence, and the State failed to disclose exculpatory evidence. We affirm.

Wilson was arrested for operating while intoxicated in the early morning hours of March 22, 1995 after the truck he was driving on a street in Iowa City was stopped by a police officer for speeding. The arresting officer smelled alcohol on Wilson's breath, noticed his speech was impaired and observed his eyes were bloodshot and watery. Wilson acknowledged he had consumed three beers. He failed to properly perform several field tests, including a horizontal gaze nystagmus (HGN) test. Wilson later refused to provide a breath specimen for testing, and further refused to supply a blood or urine specimen.

The arresting officer testified at trial to his observations, and expressed an opinion Wilson was impaired. Wilson also testified, and offered an explanation for his appearance and actions on the morning of his arrest. He testified his eyes were red and watery due to the nature of his work. He also testified his imbalance was due to his "swimmer's ear." He further testified he refused to provide a specimen for

testing on the advice of a friend who was a lawyer. Wilson's fiancée corroborated most of his testimony.

The jury who heard the evidence found Wilson guilty. He then stipulated to a prior offense.

Wilson first claims on appeal there was insufficient evidence for the jury to conclude beyond a reasonable doubt he was intoxicated. This claim is based largely on his explanation for his appearance and actions which the arresting officer viewed as signs of intoxication, as well as his claim the HGN test was not reliable.

When we review the sufficiency of evidence to support a conviction, we consider all the evidence in a light most favorable to the State. *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988). This includes any legitimate inferences and presumptions fairly and reasonably deduced from the record. *State v. Bass*, 349 N.W 2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative as long as the evidence raises a fair inference of guilt and does more than create speculation, suspicion, or conjecture. *State v Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981).

We conclude the verdict is supported by substantial evidence. The testimony of the arresting officer was sufficient to convince a rational jury Wilson was intoxicated, and the jury was free to disbelieve the testimony of Wilson and his fiancée. *See State v. Trammell*, 458 N.W.2d 862, 863 (Iowa App. 1990).

Considering all the testimony under our standard of review, Wilson's claim of insufficient evidence is without merit.

We also reject Wilson's claim the trial court created prejudicial error by admitting certain testimony of the arresting officer and by failing to strike portions of the State's closing argument. Wilson failed to object to the testimony at trial which he now claims was prejudicial, and has therefore waived error on appeal. *State v. Cuevas*, 288 N.W.2d 525, 529 (Iowa 1980). Furthermore, Wilson waived error on his claim of improper final argument by failing to timely object and file a timely motion for mistrial. *See State v. Love*, 302 N.W.2d 115, 116 (Iowa 1981). Nevertheless, we are unable to discern any prejudicial error based on any claim at trial raised by Wilson.

Finally, we reject Wilson's claim the State withheld exculpatory evidence. The claim was based on Wilson's trial testimony that another officer had arrived at the scene of the stop. The arresting officer testified no other person was present during the field sobriety tests, and he did not request a back-up officer.

Wilson failed to preserve error on this claim by filing a timely motion for new trial. Furthermore, he presented no evidence to rebut the State's denial of his claim of the presence of another officer, or to show any such evidence would have been material or exculpatory. *See State v. Anderson*, 410 N.W.2d 231, 232-35 (Iowa 1987) (defendant has burden of proving materiality).

We have fully considered all claims raised by Wilson. We affirm the judgment and sentence of the district court.

AFFIRMED.