

FILED

SEP 21 1978

460

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

THOMAS ARTHUR FREESTONE,

Appellant.

)

)

)

)

)

)

)

Filed September 21, 1978

638

61597

Appeal from Johnson District Court - Joseph Thornton, Judge.

Defendant appeals conviction for operating a motor vehicle while under the influence of an alcoholic beverage. Affirmed.

J. D. Merris, Cahill, Johnston, Poula & Goetz, of Iowa City, for appellant.

Richard C. Turner, Attorney General, Raymond Sullins, Assistant Attorney General, and Jack W. Dooley, Johnson County Attorney, for appellee.

Submitted to Danielson, Acting C.J., Snell, Oxberger and Carter, JJ.

Defendant appeals his conviction for operating a motor vehicle while under the influence of an alcoholic beverage in violation of § 321.261, The Code. His single appeal point asserts that the trial court erred in refusing to give his requested instruction on circumstantial evidence where no chemical test was admitted into evidence and where the State's evidence consisted of testimony of three police officers based upon their observations of defendant at the time he was arrested. We find no merit in defendant's contention and affirm the trial court.

In *State v. Moehlis*, 250 N.W.2d 42, 47 (Iowa 1977), the court recognized that where some but not all elements of an offense are the subject of direct evidence, an instruction on circumstantial evidence may properly be denied. In the present case there was direct evidence of the following facts: (a) defendant was driving his motor vehicle on the wrong side of the center line; (b) at said time defendant's eyes were bloodshot and he had a strong odor of alcohol on his breath; (c) defendant was unsteady on his feet and his speech was incoherent; and (d) defendant failed to perform properly field sobriety tests. In addition, defendant in his trial testimony admitted to some drinking of alcoholic beverages, which admissions constitute direct evidence. See *State v. Tornquist*, 254 Iowa 1135, 1157, 120 N.W.2d 483 (1963). Based upon some or all of the foregoing direct evidence, three police officers who testified at the trial expressed an opinion that defendant, at the material time and place, was under the influence of an alcoholic beverage.

Based upon the nature of the evidence we believe the trial court acted properly in declining to give an instruction on circumstantial evidence. The ultimate fact of whether a motor vehicle operator is under the influence of an alcoholic beverage is always a matter of opinion based upon the evidence of defendant's actions and conditions. This is true even where (unlike the present case) evidence of a chemical test is relied upon by the State, as such evidence is not conclusive of the ultimate issue. It could therefore be argued that proof of guilt in this type of case is always circumstantial, requiring the giving of the instruction in all cases. We decline to impose such a requirement and affirm defendant's conviction.

AFFIRMED.