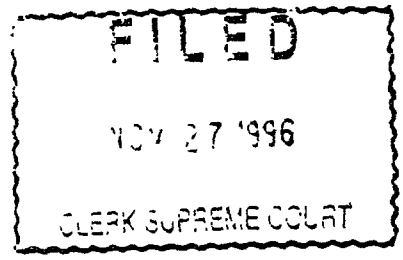
IN THE COURT OF APPEALS OF IOWA

No. 6-597 / 95-1577



STATE OF IOWA,

Plaintiff-Appellee,

vs.

DARRYL DEAN STEEVE,

Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Bruce Graham, District Associate Judge.

Defendant appeals his conviction for operating a vehicle while under the influence of alcohol and/or drugs, second offense. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Kevin Parker, County Attorney, and Douglas Hammerand, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Huitink and Vogel, JJ.

PER CURIAM

This is an appeal by a defendant challenging his conviction and sentence for the crime of operating a vehicle while under the influence of alcohol or drugs (OWI), second offense, in violation of Iowa Code section 321J.2. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On September 18, 1994, deputy sheriff Tim Cook followed a pickup truck which he determined was speeding. When he stopped the truck, Darryl Steeve was in the driver's seat and Gary Richardson was in the passenger seat. Cook noticed Steeve had an odor of alcohol and Steeve admitted he had consumed some beer. Steeve failed field sobriety tests. A urine test showed Steeve had an alcohol level of .080 and tested positive for the presence of methamphetamine and marijuana.

Steeve claimed Richardson had been driving the pickup. He stated shortly before Cook stopped the vehicle, Richardson moved over him to the passenger side of the vehicle. Steeve stated he placed his foot on the brake and his hand on the steering wheel only to avoid running the pickup into the ditch. The district court rejected Steeve's request to have the jury instructions provide the term "operate" meant the willful and voluntary control of a motor vehicle. The court did add the uniform jury instruction on general intent.

A jury found Steeve guilty of OWI. Steeve was sentenced to fourteen days in the county jail and placed on probation for a period of eighteen months. As a condition of probation, he was required to complete Drinking Driver's School,

complete a substance abuse evaluation, and follow through with any recommendations for treatment. Steeve appeals his conviction and sentence.

I. Steeve contends the district court erred by failing to instruct the jury on the defense of necessity. He admits he did not specifically request an instruction on this defense. However, he states his request to modify the definition of the term "operate" was sufficient to alert the court to this theory. We conclude Steeve failed to preserve error on this issue. Steeve had several objections to the jury instructions, but the defense of necessity was never mentioned.

II. In the alternative, Steeve claims he received ineffective assistance because his trial counsel did not request a jury instruction on the defense of necessity. To establish a claim of ineffective assistance of counsel, a defendant must show that the attorney failed to perform an essential duty, and prejudice resulted to the extent it denied defendant a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992).

We find Steeve failed to show he received ineffective assistance of trial counsel. Although the defense of necessity was not submitted to the jury, Steeve's counsel successfully sought the inclusion of uniform jury instruction 200.1, the general intent instruction. This instruction provided that the defendant's acts must be voluntary. Thus, the jury was instructed on defendant's claim that he did not voluntarily drive the pickup. We conclude Steeve has not shown he was denied a fair trial due to the lack of a jury instruction on the defense of necessity.

III. Steeve claims his sentence is illegal. Under sections 321J.2(2) and 321J.3(1) it is mandatory that a court order a substance abuse evaluation prior to sentencing a defendant. *State v. Squires*, 545 N.W.2d 557, 559 (Iowa 1996). There are two exceptions to this rule: (1) when the court receives the substantial equivalent of a substance abuse evaluation; and (2) where the public interest in securing an evaluation has been fully served. *State v. Weber*, 545 N.W.2d 317, 318 (Iowa 1996). No substance abuse evaluation was ordered prior to Steeve's sentencing.

We find the present case fits within the second exception. As the supreme court recognized in *State v. Rutter*, 547 N.W.2d 226 (Iowa 1996), where the district court has ordered a defendant to undergo substance abuse treatment, no further societal benefit could be obtained by remanding the case for the preparation of a substance abuse evaluation. *Id.* at 227. Here, the court ordered Steeve to complete a substance abuse evaluation and to follow through with any recommended treatment. We determine the public interest in securing an evaluation has been fully served.

We affirm defendant's conviction and sentence for operating while under the influence. Costs of this appeal are assessed to defendant.

AFFIRMED.