

IN THE COURT OF APPEALS OF IOWA

No. 7-079 / 96-0411

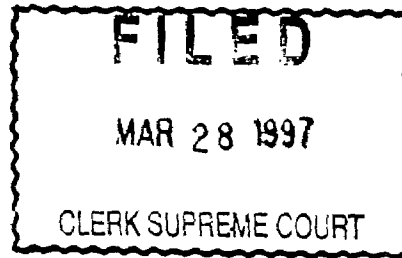
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROBERT WAYNE KUYPER,

Defendant-Appellant.



Appeal from the Iowa District Court for Emmet County, W. B. MacDonald,
Judge.

Robert Kuyper appeals the judgment and sentence entered upon his conviction
of operating while intoxicated in violation of Iowa Code section 321J.2 (1993).

AFFIRMED.

James D. Hart of Anderson, Pelzer & Hart, Estherville, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney
General, Lynn K. Fillenwarth, County Attorney, and Richard Meyer, Assistant
County Attorney, for appellee.

Considered by Sackett, P.J., and Cady and Vogel, JJ.

PER CURIAM

Defendant-appellant Robert Kuyper appeals the judgment and sentence entered upon his conviction of operation while intoxicated in violation of Iowa Code section 321J.2 (1993). Defendant contends there is not substantial evidence supporting his conviction and the trial court should not have allowed the arresting deputy to testify in his opinion defendant was driving the car. We affirm.

Defendant admits he was intoxicated when found in the ditch behind the steering wheel of his car. He contends his motion for acquittal should have been granted because the State did not introduce substantial evidence showing he drove his car in an intoxicated condition.

Substantial evidence is such evidence as could convince a rational trier of fact beyond a reasonable doubt defendant was driving the car while intoxicated. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). We view the evidence in the light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

There was evidence introduced at trial defendant was found asleep behind the wheel of his car. The car was in the ditch. It was turned off, although the engine was warm. Defendant told the deputy he had two beers at Wallingford, which is approximately four miles from where defendant was found. Defendant told the deputy he "must have" driven the car in the ditch.

Defendant contends there is only circumstantial evidence to support a finding he was driving. He argues in this case it is not sufficient.

The operation of a motor vehicle by a defendant charged with operating while intoxicated may be established by circumstantial evidence as well as direct evidence. *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996). Circumstantial evidence and direct evidence are equally probative. *See* Iowa R. App. P. 14(f)(16). We consider both what the deputy saw and heard and what the facts infer could reasonably have transpired prior to the officer's arrival. *See Boleyn*, 547 N.W.2d at 205. There was substantial evidence supporting the conviction.

Defendant next advances the district court erred in allowing the officer to give an opinion about who drove defendant's vehicle into the ditch. Defendant asserts the State failed to lay a proper foundation for the deputy's testimony.

The county attorney asked the deputy his opinion as to who he thought was the driver of defendant's vehicle resting in the ditch. Defendant objected on the ground the State did not lay a proper foundation for the deputy's testimony. The district court allowed the deputy to state whether he held such an opinion, but did not permit him to give his opinion. The district court later reversed its ruling and allowed the deputy to offer his opinion.

The deputy's opinion was tantamount to an opinion of defendant's guilt. *See State v. Oppedal*, 232 N.W.2d 517, 524 (Iowa 1975). His opinion was fact based and should have been presented in the form of facts, not opinion. *See State v. Kinsel*, 545

N.W.2d 885, 889 (Iowa App. 1996). We do not, however, find defendant was prejudiced by the admission of the deputy's opinion. The deputy testified he found defendant behind the steering wheel, the car motor was warm, there were no others around, and defendant told the deputy he was alone and he must have driven the car in the ditch. The record does not reflect defendant was prejudiced by the challenged testimony. *See State v. Traywick*, 468 N.W.2d 452, 454-55 (Iowa 1991).

AFFIRMED.