FILED
MAY 28 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	540
Plaintiff-Appellee,	)	Filed May 28, 1985
vs.	)	
DALE ALLEN WOLFE,	)	5-118 83-1652
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Bremer County - Ralph F. McCartney, Judge.

Defendant appeals from his conviction, after a jury trial, of operating a motor vehicle while under the influence of alcohol, first offense, in violation of Iowa Code section 321.281(1)(a) (1983). AFFIRMED.

Charles L. Harrington, Appellate Defender, and Deborah Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Defendant appeals from his conviction of operating a motor vehicle while under the influence of alcohol (OWI) in violation of Iowa Code section 321.281(1)(a). He asserts that the trial court erred in refusing to instruct the jury on Iowa Code section 321.281(8), which establishes the blood alcohol level at which intoxication may be presumed by the jury. We affirm.

Dale Allen Wolfe was charged with OWI and tried to a jury. The State did not introduce any breath test results because the defendant had refused to take a test. Rather, the State's case was comprised of evidence of Wolfe's appearance and behavior at the time he was stopped for erratic driving, as well as the fact that he failed the field sobriety tests.

Defendant and his mother testified that in the four and a half hours before his arrest, he had consumed only two and a half glasses of beer. At the close of the evidence, defendant and the State stipulated that if an expert had been called to testify about blood alcohol levels, he would have testified that for each beer or mixed drink a 150-pound person drinks, his blood alcohol level increases between .02 and .025 percent per milligram of blood volume, and that for each hour after the person begins drinking, his blood alcohol level will decrease .015 percent per milligram of blood volume.

Defendant asked that the jury be instructed, pursuant to Iowa Code section 321.281(8), that a person with ten hundredths or more of one percent by weight of alcohol in his blood is presumed to be under the influence of alcohol. Apparently, defendant's reasoning was that the jury would interpret the instruction to mean it could not presume intoxication if it found that defendant's blood alcohol level was less than the statutory amount. The trial court's refusal to give the instruction forms the basis for this appeal.

Iowa Code section 321.281(8) provides:

> In any prosecution under this section, evidence of the results of analysis of a specimen of the defendant's blood, breath, saliva, or urine is admissible upon proof of a proper foundation. In an action in which a violation of subsection 1, paragraph "a" of this section is alleged, evidence that there was, at the time, ten hundredths or more of one percent by weight of alcohol in the defendant's blood is presumptive evidence that the defendant was under the influence of an alcoholic beverage.

Defendant's argument concerning this provision is two-fold: 1) that the application of the statutory presumption is not limited to cases where the results of blood alcohol testing have been submitted into evidence, and 2) that evidence presented by the defendant was adequate to support giving the instruction.

Our review of the record convinces us that we need not address the first prong of defendant's argument. There is simply not sufficient evidence to require an instruction on the statutory presumption. The record is void of any evidence which would indicate that Wolfe's blood alcohol level was high enough to trigger this presumption of intoxication. Thus, it can hardly be said that a jury question is raised in this respect.

Essentially, the point of confusion in this case is the defendant's attempt to characterize section 321.281(8) as setting forth a threshold blood alcohol level below which a person is not under the influence. This interpretation is inappropriate. As the State indicates, section 321.281(8) was enacted to establish the blood alcohol level at which a presumption would rise and nothing more. "Its true purpose is to permit a case to go to the jury . . . upon nothing more than a showing of the required blood alcohol content." State v. Boner, 203 N.W.2d 198, 199 (Iowa 1972). Thus, absent evidence indicating that defendant's blood alcohol level was more than ten hundredths of one percent, the statutory presumption is obviously inapplicable and no instruction should be given to the jury.

AFFIRMED.