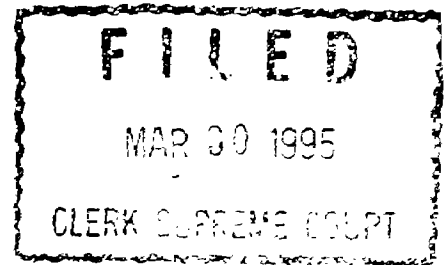


IN THE COURT OF APPEALS OF IOWA

No. 5-095 / 94-550



STATE OF IOWA,

Appellee,

vs.

ALLAN MICHAEL DONOVAN,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Walter Rothschild, District Associate Judge.

Allan Donovan appeals his convictions, following a jury trial, of operating while intoxicated, second offense.
AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Anthony Janney, Assistant County Attorney, for appellee.

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

HAYDEN, J.

On May 19, 1993, a red pickup truck occupied by Bruce Hunt, Mike Oswald, and Allan Donovan struck a pedestrian crossing Sixth Street in Waterloo. The truck stopped, backed up, and drove away.

Cynthia Frizzell and her daughter, Shanell Frizzell, followed the truck and copied its license number. Officer Knutson located the truck and found the three men standing nearby. All three men indicated Hunt was driving the truck when the pedestrian was hit.

Officer Knief arrived at the scene with the Frizzells. The Frizzells had described the driver as a "white male with longer hair." Officer Knief took each man to the squad car where the Frizzells were seated. The Frizzells eventually identified Donovan as the driver.

Officer Knief then informed Hunt he could be charged with interference or perjury if he was lying. Hunt then stated Donovan was driving. The officer arrested Donovan, who refused to consent to a breath test.

The State charged Donovan with operating a motor vehicle while intoxicated, second offense; operating a motor vehicle while revoked; and failure to leave information and aid at the scene of an injury accident.

At trial, Vivian Johnson testified she saw the accident from close range but could not identify the driver. Cynthia Frizzell testified she observed the accident in her rearview mirror. She decided to follow the truck to obtain

its license number once the truck began to drive away. She indicated there were two blonde-haired men in the truck and a man with shoulder-length curly, dark hair was driving. She admitted she never got a "real good square look" at the driver's face.

Shanell Frizzell testified her mother originally thought one of the blonde-haired men was driving. Her mother changed her mind after Shanell told her she believed the dark-haired man had been driving. Shanell testified she was "pretty much" sure the man with the dark, curly hair was the driver.

Officer Knief admitted the Frizzells' identification from his squad car was not a "quick, strong positive I.D."

Ann Fulton, a friend of Donovan's, testified Hunt was driving the pickup and Donovan was seated in the middle position when the truck pulled into her driveway that evening. Oswald and Donovan also testified Hunt had been driving.

Prior to cross-examining Oswald, the prosecutor requested a brief hearing to determine the admissibility of prior statements. The alleged false statements were made by Oswald during the investigation of an unrelated OWI and during a suppression hearing in that same case.

The trial court sustained Donovan's objection to use of the statements because they were irrelevant to the current charges. However, during cross-examination, the following exchange occurred:

Q. (By Mr. Janney) Mr. Oswald, have you ever made a false statement under oath?

MR. MASON: Objection, Your Honor.

THE COURT: Sustained.

Q. Have you ever lied to a police officer while he was investigating something?

MR. MASON: Objection, Your Honor.

THE COURT: Mr. Janney, I have sustained this objection previously. You're way out of line for bringing this incident up again after the Court has sustained that objection.

Donovan's counsel did not move for a mistrial after the exchange.

The jury found Donovan guilty of OWI, second offense, and failure to leave information and give aid at an injury accident scene. The State subsequently dismissed the remaining charge. The trial court entered judgment and imposed sentence.

Donovan appeals. He contends the trial court erred in denying his motion for judgment of acquittal. He admits he was under the influence of alcohol the night of the accident, but claims there was not substantial evidence to support a finding he was operating the motor vehicle. He notes neither of the Frizzells mentioned hair color prior to viewing the occupants individually. He asserts Cynthia's testimony is tainted due to Shanell's admission Cynthia originally thought a blonde-haired person was driving.

Donovan further claims his trial counsel rendered ineffective assistance by failing to move for a mistrial based on the prosecutor's violations of the court's ruling excluding Oswald's prior statements.

I. Substantial Evidence.

In our review of motions for judgment of acquittal and new trial based on sufficiency of the evidence, we view the evidence in the light most favorable to the State. State v. Rojas-Cardona, 503 N.W.2d 591, 594 (Iowa 1993). We draw all fair and reasonable inferences from the evidence, taking all of the evidence into consideration. We uphold a trial court's refusal to grant a motion for judgment of acquittal if there is substantial record evidence to support the charge. Id. Evidence is substantial if it could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. (citing State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981)).

Defendant claims there was insufficient evidence to support his conviction. We disagree.

Vivian Johnson and Cynthia and Shanell Frizzell watched as the red pickup entered the intersection, hit the pedestrian, and left the scene. The Frizzells followed the pickup truck to copy the license plate number. In so doing, the Frizzells observed the driver whom they described as having long, dark curly hair. When police found the pickup truck parked in an alley behind a Waterloo residence, the Frizzells were taken to that location to identify the driver. The Frizzells identified defendant, the only one of the three with long, dark, curly hair, as the driver. Further, although he did not admit it

initially, one of the passengers in the pickup, Bruce Hunt, told an officer defendant was in fact driving the truck at the time of the accident.

Defendant argues, however, the witness identifications are inconsistent and do not establish defendant drove the pickup at the time of the accident. Admittedly, defendant introduced evidence to support his claim Hunt was driving the pickup at the time of the accident. Defendant also contends Cynthia Frizzell's identification of him as driver was suspect because Shanell Frizzell "told" her mother the dark-haired man was the driver. This evidence is not fatal to the State's case. The jury was free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as, in its judgment, such evidence should receive. State v. Thornton, 498 N.W.2d 670, 673 (Iowa 1993) (citing State v. Schrier, 300 N.W.2d 305, 309 (Iowa 1981)). "The very function of the jury is to sort out the evidence presented and place credibility where it belongs." State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984) (citations omitted). The contrary evidence presented by defendant does not negate the existence of evidence demonstrating defendant was driving the pickup at the time of the accident. See State v. Frake, 450 N.W.2d 817, 818-19 (Iowa 1990). We hold there is substantial evidence in the record to support the jury's verdict. The trial court is affirmed on this issue.

II. Ineffective Assistance of Counsel.

Defendant also claims he was denied effective assistance of counsel when his defense counsel failed to move for a mistrial following alleged prosecutorial misconduct. When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975) (numerous citations omitted); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

Conviction affirmed.

AFFIRMED.