IN THE COURT OF APPEALS OF IOWA

No. 9-253 / 98-714

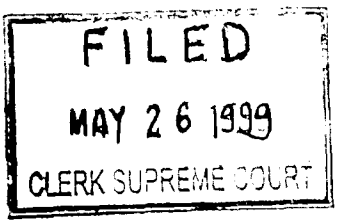
STATE OF IOWA,

Appellee,

vs.

MARK WADE DALTON,

Appellant.



Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan, Judge.

Mark Wade Dalton appeals his conviction for operating a motor vehicle while under the influence of alcohol, third offense. **AFFIRMED.**

Joseph L. Marks of Marks, Marks & Marks, Urbandale, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Michelle Chenoweth, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Mark Wade Dalton appeals from his conviction and sentence for operating a motor vehicle while under the influence of alcohol, third offense, in violation of Iowa Code section 321J.2 (1997). He contends the evidence was not sufficient to support his conviction.

I. Background Facts and Proceedings. On April 21, 1997, Iowa State patrol trooper Dennis McMahon stopped Mark Dalton's car after noticing Dalton was not wearing his seat belt and that the car he was driving had a cracked tail light lens. As he talked with Dalton, trooper McMahon noticed the odor of alcoholic beverages on Dalton's breath and person and observed his eyes were blood-shot and watery. The trooper also observed Dalton place a throat lozenge in his mouth.

According to the trooper's testimony, Dalton seemed confused about the reason for the traffic stop. He asked several times why trooper McMahon had stopped his car. Dalton's speech was slurred and he mumbled as he spoke with the trooper. Dalton told McMahon that he had consumed three beers. Another trooper later found a large plastic cup containing beer behind the driver's seat in Dalton's vehicle.

Trooper McMahon administered a field sobriety test — the Horizontal Gaze Nystagmus Test (hereinafter "HGN test") — to Dalton. Dalton failed the test, exhibiting the maximum number of clues indicating impairment. Thereafter, Dalton refused to submit to any other field sobriety tests without his attorney's presence.

Trooper McMahon arrested Dalton and transported him to post headquarters. After Dalton's attorney arrived and spoke with Dalton, trooper McMahon requested that Dalton submit to an intoxilizer test. Dalton refused.

On June 5, 1997, the State filed a trial information charging Dalton with operating while under the influence of alcohol, third offense, in violation of Iowa Code section 321J.2 (1997). Dalton testified at his jury trial, which began on January 5, 1998. According to his version of the events, he finished working a shift at the Bridgestone-Firestone plant at 6:00 a.m. on the morning of April 21. He testified his job is hot and dirty and often makes his eyes irritated and watery. He further testified that after leaving work, he and a co-worker went to their union hall to conduct union business but that it had not yet opened. Dalton claimed he and his co-worker then went to a bar and consumed one beer. Dalton next went to an auto shop and then back to the union hall which was still not open. Dalton then testified that at 10:00 a.m. he proceeded back to the bar to get his companion. He maintains he drank two more beers over a span of forty to forty-five minutes.

Dalton and his co-worker then left the bar and went to the union hall where they were able to conduct their business. They then drove to a convenience store, where Dalton claimed to have bought gas and his co-worker bought one beer. After leaving the convenience store, Dalton was pulled over by trooper McMahon.

The jury found Dalton guilty of operating under the influence. Dalton appealed, contending there was insufficient evidence to support his conviction.

II. Scope of Review. Our review of sufficiency-of-evidence challenges is for correction of errors at law. *See State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). The jury's findings of guilt are binding on appeal if supported by substantial evidence. *See State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. *See State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

We cannot make a substantial evidence determination if we consider only the evidence supporting guilt. *Id.* This is because a rational fact finder cannot render a verdict without taking into consideration all the record evidence. Therefore, in determining whether there is substantial evidence, we must consider all the record evidence, not just the evidence supporting guilt. *Id.* However, when the evidence is in conflict, the fact finder may resolve those conflicts in accordance with its own views as to the credibility of the witnesses. *See State v. Allen*, 348 N.W.2d at 247. In assessing witness credibility and the weight of the evidence, a fact finder is guided by its common sense and prior experience. *See State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979) (quoting *United States v. Becker*, 62 F.2d 1007, 1010 (2d Cir. 1933)).

III. Sufficiency of Evidence. Under Iowa Code section 321J.2, a person commits the offense of operating while intoxicated by operating a motor vehicle either: 1) while under the influence of alcohol; or 2) while having an alcohol

concentration of .10 or more. *See* Iowa Code § 321J.2(1) (1997). Because Dalton declined to submit to an intoxilizer test as requested by trooper McMahon, he was prosecuted under the first alternative — operating a motor vehicle while under the influence of alcohol.

The record reveals there was sufficient evidence to support the jury's conclusion Dalton operated a motor vehicle while under the influence of alcohol.

The factors indicating a person is under the influence are set forth in the Iowa criminal jury instructions. They include:

(1.) Reason or mental ability has been affected.

(2.) Judgment is impaired.

(3.) Emotions are visibly excited.

(4.) Loss of control of bodily actions or emotions.

See Iowa Crim. Jury Instructions 2500.5 (1988); *accord State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992).

Dalton's failure of the HGN test and his slurred mumbling speech support the conclusion that he had to some extent lost control of bodily actions or motions. His confusion about the reason for the traffic stop, as well as his slurred speech and mumbling, demonstrate that his reason or mental ability were affected.

Furthermore, the odor of alcohol on Dalton's breath and person, his use of a throat lozenge, his admission that he had been drinking, and the discovery of an open container of beer in his car support the conclusion his impairment was due to the consumption of alcohol.

In his testimony at trial, Dalton offered other explanations for failing the HGN test and for using a throat lozenge. In addition, he claimed that the open container of beer in his vehicle belonged to his passenger.

We note, however, that with regard to Dalton's credibility in offering these explanations, the jury, as finder of fact, had the duty of assessing the credibility of witnesses and determining the weight to be given to the various items of evidence. *Cf. In re Property Seized from Chiodo*, 555 N.W.2d 412, 415 (Iowa 1996) (stating that "[a]s finder of fact, the district court had the duty of assessing the credibility of the witnesses and determining the weight to be given to the various items of evidence.") We conclude there was substantial evidence from which a jury could conclude Dalton was driving under the influence on the morning of April 21, 1997. We therefore affirm.

AFFIRMED.

No. 98-714. [9-253] STATE v. DALTON

Appeal from the Iowa District Court for Polk County, Cynthia M. Moisan, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel, and Zimmer, JJ. Opinion by Zimmer, J. (6 pages $2.40)

Dalton appeals from his conviction and sentence for operating a motor vehicle while under the influence of alcohol, third offense. He contends the evidence was not sufficient to support his conviction. **OPINION HOLDS:** ***Sufficiency of the Evidence.*** Under Iowa Code section 321J.2, a person commits the offense of operating while intoxicated by operating a motor vehicle either: 1) while under the influence of alcohol; or 2) while having an alcohol concentration of .10 or more. *See* Iowa Code § 321J.2(1) (1997). Because Dalton declined to submit to an intoxilizer test as requested by trooper McMahon, he was prosecuted under the first alternative — operating a motor vehicle while under the influence of alcohol. The record reveals there was sufficient evidence

No. 98-714. [9-253] STATE v. DALTON (continued)

to support the jury's conclusion Dalton operated a motor vehicle while under the influence of alcohol. Dalton's failure of a Horizontal Gaze Nystagmus test and his slurred mumbling speech support the conclusion that he had to some extent lost control of bodily actions or motions. *See* Iowa Crim. Jury Instructions 2500.5 (1988); *State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992). His confusion about the reason for the traffic stop, as well as his slurred speech and mumbling, demonstrate that his reason or mental ability were affected. *Id.* Furthermore, the odor of alcohol on Dalton's breath and person, his use of a throat lozenge, his admission that he had been drinking, and the discovery of an open container of beer in his car support the conclusion his impairment was due to the consumption of alcohol.