IN THE COURT OF APPEALS OF IOWA

No. 5-592 / 94-2094

STATE OF IOWA,

Appellee,

vs.

KEVIN KENDALL HEIN,

Appellant.

FILED
NOV 27 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, Thomas Hronek, Judge.

The defendant appeals the judgment and sentence entered upon his conviction, following a jury trial, of operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Robert P. Ewald, Assistant Attorney General; Mary E. Richards, County Attorney; and Ronald Sotak, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Cady, JJ.

DONIELSON, C.J.

The defendant, Kevin Hein, appeals from his conviction and sentence for operating while intoxicated, second offense. He challenges the sufficiency of the evidence to support the conviction and claims his trial counsel was ineffective. We affirm.

I. SUFFICIENCY OF THE EVIDENCE.

The defendant argues there was insufficient evidence to support his conviction. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

A review of the record reveals substantial evidence supports the defendant's conviction. Eyewitnesses observed the defendant twice hit another vehicle as he

attempted to park his van at the Iowa State University stadium. He left the scene of the accident and parked elsewhere at the stadium. The defendant subsequently had his son leave a note on the damaged vehicle indicating his phone number.

The witnesses reported the accident and shortly thereafter officers with the Iowa State University Department of Public Safety arrived and spoke with the defendant. The arresting officers found the defendant's speech was slurred and his eyes were blood shot. They administered field sobriety tests which the defendant failed. At trial the defendant admitted he had initially lied to the officers when he had denied being the driver and when he denied he had consumed any alcohol after the accident.

The defendant contends he was not intoxicated at the time of the accident and only consumed vodka after he had parked his van and before Officer Larkin appeared at the scene. There was conflicting evidence as to the amount of time which had elapsed between the time of the accident and Officer Larkin's appearance at the defendant's vehicle. However, the State's witnesses indicated the lapse of time was no greater than ten to fifteen minutes, and the defendant's oldest daughter testified she did not see her father drink anything after he had parked his van.

Operation of a motor vehicle by a defendant charged with operating while intoxicated may be established by circumstantial evidence. *State v. Braun*, 495 N.W.2d 735, 739 (Iowa 1993). A defendant's manner of driving at the time of a collision and his conduct immediately thereafter are relevant to the question of

intoxication. *State v. Walker*, 499 N.W.2d 323, 325 (Iowa App. 1993). Leaving the scene of an accident is also evidence of impaired judgment. *Id.*

There was sufficient evidence from which the jury could find the defendant had been intoxicated when the accident occurred. Given the size of the parking spot the defendant was trying to enter, the jury could have concluded the defendant would not have twice hit the adjacent vehicle had he not been impaired. The defendant left the scene and was observed shortly thereafter as having slurred speech and bloodshot eyes, and he failed the field sobriety tests. There was sufficient evidence to prove the defendant was operating a motor vehicle while intoxicated, and we affirm the conviction.

II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The defendant claims his trial counsel was ineffective for failing to move to exclude or object to testimony based on the alleged lack of qualifications of Officer Larkin. A defendant bears the burden of proving by a preponderance of the evidence that he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements: 1) counsel failed to perform an essential duty; and 2) he was prejudiced by counsel's omission. *Id.* at 563-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a reasonable probability that but for his trial attorney's unprofessional errors, the

resulting conviction and sentence would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* Our review is based upon an evaluation of the totality of the circumstances. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa 1994).

The defendant argues Officer Larkin did not meet the definition of a "peace officer" and was therefore not authorized to arrest him and invoke the implied consent procedures. The definition of "peace officer" includes "[a]ny other law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety." Iowa Code §321J.1(7)(e) (1993). The record reveals Officer Larkin attended a law enforcement academy in Lincoln, Nebraska. Following her employment in Iowa, she attended an eight-hour class regarding the detection and testing of persons operating under the influence of alcohol. That class was administered by officers of the Ames police department. During cross-examination Officer Larkin testified she did not know if the course she had attended was "state-approved."

Since a party claiming ineffective assistance of counsel must prove incompetent representation and prejudice, a reviewing court can dispose of the claim upon the basis of no prejudice without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). We find the defendant has failed to prove prejudice. He was observed and arrested by both Officer Larkin and Officer Butterbaugh. It is not disputed that Butterbaugh, who attended the Iowa law enforcement academy, met the statutory definition of "peace officer." Assuming, *arguendo*, Officer Larkin was not qualified as a peace officer, her testimony was merely cumulative of that given by Officer Butterbaugh. The defendant cannot demonstrate the outcome of the trial would have been different without the evidence provided by Officer Larkin.

AFFIRMED.