IN THE COURT OF APPEALS OF IOWA

No. 7-032 / 96-0459

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROBERT LEE PETRO, JR.,

Defendant-Appellant.

FILED
MAR 28 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Jasper County, Thomas W. Mott, District Associate Judge.

Defendant appeals from the judgment and sentence entered upon his conviction for operating a motor vehicle while intoxicated in violation of Iowa Code section 321J.2 (1995). **AFFIRMED.**

Timothy McCarthy II of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Steve Johnson, County Attorney, and John Heinicke, Assistant County Attorney, for appellee.

Considered by Habhab, C.J., and Huitink and Vogel, JJ.

HABHAB, C.J.

Between 1:30 and 2:00 p.m. on April 9, 1995, defendant Robert Lee Petro, Jr. was observed drinking several beers in a bar. He and his sister, Linda Petro, had an argument and defendant left the bar angry. No one actually observed him leaving in his car, but approximately five to ten minutes later patrons of the bar were informed there had been an accident. A vehicle registered to defendant was found in a ditch approximately one-half mile west of the bar. Defendant's sister and nephew, Steven Petro, went to the location of the car but did not see defendant in the vicinity.

On the same afternoon, one of Linda's neighbors saw defendant staggering and rolling around on the ground in Linda's yard. A deputy went to Linda's residence and saw defendant running along a tree line parallel to the road. The deputy ordered defendant to stop, but he did not do so and ran faster. The deputy chased defendant, and defendant fell to the ground and began to stuff small packets of chewing tobacco into his mouth. Defendant was incoherent and later began to vomit. He was taken to a hospital where his urine sample registered an alcohol presence of .161 grams per 67 milliliters.

Defendant was charged with operating a motor vehicle while under the influence of an alcoholic beverage or other drugs, first offense. His motion for a judgment of acquittal was denied and a jury found him guilty as charged. On appeal, defendant argues the court erred in denying his motion for judgment of acquittal. He

contends there was insufficient evidence to support the conviction as the State failed to prove the elements of the offense by even circumstantial evidence.

When reviewing sufficiency of the evidence, we consider the entire record and determine whether the verdict is supported by substantial evidence. *State v. Shumpert*, 554 N.W.2d 250, 253 (Iowa 1996). "'Substantial evidence' is 'such evidence as would convince a rational trier of fact that defendant is guilty beyond a reasonable doubt.'" *Id.* (citing *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980)). In making this determination, we view the evidence in the light most favorable to the verdict and accept as established any reasonable inferences that support it. *Id.*; *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995); *State v. Geier*, 484 N.W.2d 167, 170 (Iowa 1992). The weight of the evidence and credibility of witnesses are to be determined by the jury and not the appellate court. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984).

At the close of evidence, the jury was instructed in part as follows:

> INSTRUCTION NO. 10. The State must prove both of the following elements of operating while intoxicated:
>
> 1. That on or about April 9, 1995 the defendant, Robert Lee Petro Jr., operated a motor vehicle in Iowa.
> 2. That at the time, he was under the influence of intoxicants.
>
> If the State has proved both of the elements, the defendant is guilty. If the State has failed to prove either element, the defendant is not guilty.

Operation of the motor vehicle by defendant may be established by circumstantial evidence. *State v. Braun*, 495 N.W.2D 735, 739 (Iowa 1993). Direct

evidence and circumstantial evidence are equally probative. *Id.* (citing Iowa R. App. P. 14 (f)(16)).

Defendant argues the State failed to establish beyond a reasonable doubt that he operated the motor vehicle or that he was under the influence of intoxicants. Defendant emphasizes no one observed him operating the vehicle when he left the bar or when it was found in the ditch and the keys to the vehicle were not found in the car or in his possession.

We find the State has shown sufficient evidence that reasonable grounds existed to believe defendant operated his car and was under the influence of intoxicants.

At trial an abundance of circumstantial evidence was presented to establish defendant was operating his vehicle while intoxicated. Defendant's sister testified defendant arrived with Steven Petro at Willy's Bar and was drinking beer. She explained she and defendant began arguing and he left angry. Steven did not leave with him. Five to ten minutes later, she was informed there had been an accident. She and Steven left in her daughter's car and went to investigate. She headed west and found defendant's car in the ditch near the bar. Defendant was not in the vicinity. She stated she did not see defendant driving the car at any time. Steve also testified he witnessed defendant drink beer, argue with Linda, and leave. He testified he then saw defendant's car in the ditch just a few blocks from the bar.

Linda's neighbor, Tom Kladenber, testified he heard a car pull into Linda's driveway on the day of the accident. He witnessed defendant in Linda's yard staggering about and rolling around on the ground. He explained defendant was carrying a small canvas case and rolled under a pick up parked at Linda's home. When defendant emerged from beneath the vehicle, he no longer had the canvas bag. The neighbor estimated the distance between the scene of the accident and Linda's yard was between one-and-one-half to two miles.

Jasper County Sheriff John Guthrie testified he saw defendant running along a tree line parallel to the road Linda lives on the day of the accident. He ordered the defendant to stop, but he began to run faster and eventually stumbled. Guthrie caught up to him. Defendant was stuffing small packets of chewing tobacco into his mouth. He then began choking. Guthrie asked him if he had been drinking and defendant admitted he had been drinking some beer and whiskey. After that, defendant was basically incoherent and ultimately collapsed.

Guthrie testified he and another officer carried defendant into the police station, where he began vomiting. They then took him to the hospital. Guthrie explained while at the hospital defendant was acting psychotic, mumbling, jerking and thrashing about, and continued to vomit. As defendant was unable to make any decision, Guthrie obtained permission from the doctor to draw a urine sample.

The urine sample revealed the presence of alcohol in the amount of .161 grams per 67 milliliters. Michael Rehberg, forensic toxicologist, opined at trial this amount of alcohol in a 180-pound man indicated the residual of approximately nine drinks.

After careful review of the evidence, we affirm defendant's conviction of operating a motor vehicle while intoxicated and find substantial evidence was presented at trial to support his conviction.

AFFIRMED.