

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 23 1988

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

Filed March 23, 1988

ROBERT DRAPER,

)

7-586
86-1843

390

Defendant-Appellant.

)

Appeal from the Iowa District Court for Woodbury County (No. 41713) -
Michael S. Walsh, Judge.

Defendant appeals his convictions, after jury trial, for involuntary manslaughter and leaving the scene of an accident. **REVERSED.**

Gary E. Wenell, of Baron & Wenell, Sioux City, for the defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen and Sherri Soich, Assistant Attorneys General; Michael Hobart, County Attorney; and Michael K. Williams, Assistant County Attorney for the plaintiff-appellee.

Heard by Donielson, P.J., and Sackett, and Habhab, JJ.

PER CURIAM

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Defendant, Robert Draper, appeals his convictions, after jury trial, for involuntary manslaughter and leaving the scene of an accident. See Iowa Code §§707.5(1), 321.261, .263 (1983). He was sentenced to a term of confinement not to exceed two years on the leaving the scene charge and was placed on probation for the involuntary manslaughter charge. Defendant raises several issues on appeal including a challenge to the sufficiency of the evidence to identify him as the driver. Because we reverse defendant's conviction on this ground, we do not address defendant's other assignments of error.

In determining the sufficiency of evidence to support a guilty verdict we consider the evidence in the light most favorable to the State. State v. Klindt, 389 N.W.2d 670, 676 (Iowa 1986); State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). Substantial evidence means evidence that would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Blair, 347 N.W.2d at 419. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Whether the evidence is direct or circumstantial, however, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. Blair, 347 N.W.2d at 421.

Both charges in this case arose from a fatal hit-and-run automobile accident which occurred around midnight on a highway viaduct in Sioux City. A vehicle struck two pedestrians, killing one and injuring the other. The pedestrians were standing with a bicycle and a twelve-pack of beer in the passing lane of the four-lane highway when they were both struck by the hit-and-run vehicle. The evidence showed both victims had alcohol in their blood. A second car struck the body of the victim who survived; that driver remained on the scene.

The State's investigation eventually revealed that at some point after the accident defendant paid someone to disassemble and bury his car, a station wagon which was similar in appearance to the hit-and-run vehicle as described by witnesses. There is strong evidence that defendant's car was the vehicle involved in the accident.

The marshalling instructions required the jury to find the defendant not guilty of involuntary manslaughter and leaving the scene of an accident unless the State proved beyond a reasonable doubt all elements of those crimes. The first element was that defendant was the driver of the vehicle involved in the accident.

The first witness to arrive at the scene was Kenneth Bliven. His testimony was entered at trial by deposition. Upon his arrival, Bliven began to render first aid to one of the victims. Bliven described the driver of the station wagon as a young female with straight platinum-colored shoulder length hair. Bliven estimated he was about thirty feet from the driver when he saw her face. The station wagon departed while Bliven was still attempting to resuscitate the victim. Bliven did not see anyone else at the scene. Bliven was shown a photographic array, which included defendant's picture, and stated none of the persons shown in the array was the driver.

James Wallman, the second witness to arrive at the scene, testified that he stopped near Bliven and offered to help. He observed the station wagon with its rear tires spinning as the driver tried to free the side of the vehicle from the guardrail on which it was apparently caught. Wallman estimated he was about thirty feet from the wagon when he stopped. Wallman described the driver of the car as a heavy-set man or woman with long dark blonde or light brown hair. Wallman also observed a man with dark hair standing in front

of the vehicle motioning to the driver. At some point after the accident, Wallman was shown a photographic array which included defendant's picture. He did not identify anyone in the array.

No other witnesses observed the driver of the station wagon. Defendant has a receding hairline and short curly light brown hair. Defendant did not testify at trial.

The State admits the evidence of defendant's identity as the driver of the car was entirely circumstantial since no one could positively identify him as the driver. The State contends defendant's identity as the driver may be properly inferred from defendant's destroying the car. We disagree.

The issue whether there was sufficient evidence a defendant was the driver of a hit-and-run vehicle was addressed by the Iowa Supreme Court in State v. Jones, 259 Iowa 375, 379, 144 N.W.2d 120, 123 (1966). Jones was convicted of failing to leave his name and address at the scene of a motor vehicle accident. See Iowa Code §321.264 (1962).

The victim's unoccupied parked car was struck by another vehicle. There were no witnesses. The investigating officer found a damaged headlight door from a 1958 Mercury at the scene. He also observed light green paint chips on the victim's white car at the point of impact. Police eventually contacted the defendant, Jones, and discovered white paint on the bumper of a light green 1958 Mercury frequently driven by Jones. Jones stated he had recently repaired a damaged headlight on the car but that he had no knowledge of any accident. Jones did not testify at trial.

Based on these facts, taken in the light most favorable to the State, the supreme court reversed Jones' conviction on the ground there was insufficient evidence Jones was driving the hit-and-run vehicle.

We recognize that in some cases circumstantial evidence may be sufficient to raise a jury question. See, e.g., State v. Cornelius, 165 N.W.2d 810, 812 (Iowa 1969) (sister of defendant stated he was driving hit-and-run automobile during the period when, and in area where, accident occurred); State v. Steger, 259 Iowa 1147, 1151, 147 N.W.2d 45, 47 (1966) (defendant apprehended driving car one and one-half hours after the collision; defendant was dressed as witnesses said unidentified driver was dressed at time of accident). We find the present case, however, is controlled by the court's rationale in Jones. The evidence creates no more than a suspicion defendant was driving the vehicle. See Jones, 259 Iowa at 379, 144 N.W.2d at 123; State v. Myers, 253 Iowa 271, 275, 111 N.W.2d 660, 663 (1961) (defendant found walking away from scene of accident); State v. Hooper, 222 Iowa 481, 486, 269 N.W. 431, 433 (1936) (same).

We find the evidence is insufficient to support the conviction. Defendant's motion for entry of a judgment of acquittal should have been sustained. Iowa R. Crim. P. 18(8).

REVERSED.