

IN THE COURT OF APPEALS OF IOWA

No. 0-977 / 10-0173
Filed November 23, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS ROBERT HUFF,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

A defendant appeals following his conviction for operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2009).

AFFIRMED.

Thomas P. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeremy L. Westendorf, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, J. Tabor, J., takes no part.

VOGEL, J.

In December 2008, the State charged Thomas Huff with driving while license denied or revoked in violation of Iowa Code section 321J.21 (2009), and operating while intoxicated (OWI), third offense, in violation of Iowa Code section 321J.2. Huff pleaded guilty to the license charge, and the OWI charge was tried to a jury. Prior to trial, Huff filed a motion in limine to prevent the State from using his criminal record for any purpose. The State agreed that it would not introduce evidence of Huff's "prior bad acts or prior OWIs in [its] case in chief, unless the defendant either takes the stand or opens the door in some way." The district court ruled that if Huff testified, the State would be allowed to impeach the defendant using his prior OWI second conviction.¹ Huff elected not to testify. On September 23, 2009, the jury found Huff guilty as charged.

Huff appeals and asserts that his prior OWI second conviction would not have been admissible as impeachment evidence if he chose to testify.² The State first responds that this issue is not preserved for appeal. We agree. A defendant is "required to testify at trial and face the challenged evidence before complaining of it." *State v. Derby*, 800 N.W.2d 52, 54 (Iowa 2011) (quoting *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997)). Our supreme court recently re-examined this issue and again held that a defendant must testify in order to preserve error to challenge the use of his prior convictions as impeachment. *Id.*

¹ The trial information alleged Huff had previously been convicted of OWI in 2005 and 2008, and Huff stipulated to those convictions. However, the record indicates that had Huff testified, the State would have sought to impeach Huff with only his most recent OWI conviction.

² Additionally, Huff claims his constitutional right to testify was violated, but this argument was not raised before or decided by the district court. *Derby*, 800 N.W.2d at 60 ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal." (citations omitted)).

at 59 (“It has long been settled law that a criminal defendant must testify and confront the impeachment evidence before seeking an appellate determination of admissibility.”). Huff’s claim is not preserved for our review. We affirm.

AFFIRMED.