IN THE COURT OF APPEALS OF IOWAB

No. 1-746 / 10-1848
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEPHTHAH BURTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carol Coppola, District Associate Judge.

Defendant appeals his convictions for operating while intoxicated, open container, operating without a valid driver's license, and failure to provide proof of financial liability coverage. **AFFIRMED IN PART AND REVERSED IN PART**.

Mark C. Smith, State Appellate Defender, Stephen J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and Kevin Hathaway and Brendan Greiner, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, P.J., Mullins, J., and Miller, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

On September 10, 2010, Officer William Ostoj of the West Des Moines Police Department received a report of an accident on Grand Avenue. When Officer Ostoj arrived at the scene he observed a person walking on the road. There was a van about 100 yards farther down the road in the ditch, "at least to the top of the wheels in mud and water." The person was identified as Jephthah Burton. Burton's pants legs were muddy and wet. Burton stated he owned the van and the vehicle was registered to him. When asked which direction he had been driving, he stated he was "coming this way," and pointed in the direction he had been walking.

Officer Ostoj noticed that Burton's speech was heavily slurred, and his eyes were watery and bloodshot. As the officer questioned Burton he became angry or agitated. Officer Ostoj smelled an odor of an alcoholic beverage on Burton's breath. Burton swayed while he was standing, and he was unsteady on his feet. Burton initially denied he had been drinking, but then admitted he had a small amount of alcohol. Burton failed the horizontal gaze nystagmus test. He also failed the walk and turn test. Burton refused to participate in any more field sobriety tests. After being taken to the police station, he refused to provide a breath sample.

Burton was charged with operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2009), an aggravated misdemeanor. The State also filed complaints against him for open container, in

violation of section 321.284, a simple misdemeanor; operating without a valid driver's license, in violation of section 321.218, a simple misdemeanor; and failure to provide proof of financial liability coverage, in violation of section 321.20B, a simple misdemeanor.

Immediately before the trial the State asked the court to reconsider an earlier ruling that not only the OWI charge, but also the simple misdemeanors, would be tried to the jury. Burton resisted the State's request. After some discussion, the court stated it would stick with its initial ruling and all of the charges would be presented to the jury.

During the trial, the State presented the testimony of Officer Ostoj, as outlined above. Burton testified that he met a hitchhiker named Mark in Colfax. After talking to Mark for about five or ten minutes he allowed him to drive the van while Burton lay down in the back. Burton stated Mark drove the van into the ditch and then ran away. Burton testified he had not had any alcohol since the night before. He also testified that due to an injury he had problems with his balance.

The jury returned verdicts finding Burton guilty of all of the charges against him. The court denied Burton's motion in arrest of judgment. Burton was sentenced to a term of imprisonment not to exceed two years and ordered to attend substance abuse treatment.[1] He now appeals his convictions.

[1] The record does not contain any indication of the penalties imposed due to the simple misdemeanor convictions in this case.

II. Jurisdiction

The State asserts that under section 814.6(1)(a) Burton does not have the right to appeal his simple misdemeanor convictions. Under this section a defendant is granted the right of appeal from "[a] final judgment of sentence, except in case of simple misdemeanor and ordinance violation convictions." Iowa Code § 814.6(1)(a). A defendant, however, may request discretionary review of simple misdemeanor and ordinance violation convictions. *Id*. § 814.6(2)(d); *Tyrrell v. Iowa Dist. Ct*., 413 N.W.2d 674, 675 (Iowa 1987).

Burton did not file an application for discretionary review under Iowa Rule of Appellate Procedure 6.106. When a party files a notice of appeal instead of an application for discretionary review, "the case shall not be dismissed, but shall proceed as though the proper form of review had been requested." Iowa R. App. P. 6.108. We consider Burton's appeal as an application for discretionary review. All of the charges against Burton were tried at one time. We determine the other charges, as well as the OWI charge, may all be reviewed in this action.

III. Severance of Charges

Burton contends the district court should have severed the simple misdemeanor charges from the indictable offense of OWI. He claims he was prejudiced because the jury was more likely to find him guilty of OWI due to evidence relating to an open container of alcohol. He also argues that if the counts had been severed the State would have been prohibited from eliciting testimony regarding the simple misdemeanors.

We note that prior to the trial it was the State that asked to have the simple misdemeanors severed from the OWI charge. Defense counsel stated, "[i]t seems to me that it should all be bundled together and the jury should have an opportunity to decide." After discussion with Burton, defense counsel stated that if the simple misdemeanors were tried to the bench, "it may affect whether or not I would call my client as a witness or not." Defense counsel also stated that if the misdemeanors were tried to the court, "there may be some plea negotiations that would allow my client—." The court then ruled that it would not change its initial ruling that the simple misdemeanors would be tried with the OWI charge.

Even if it was an error not to sever the simple misdemeanor charges from the OWI charge, a defendant may not allege error on an issue to which he previously acquiesced. *See State v. Hall*, 740 N.W.2d 200, 202 (Iowa Ct. App. 2007). A party may not assume inconsistent positions in the trial and appellate courts. *State v. Sage*, 162 N.W.2d 502, 504 (Iowa 1968). We conclude defense counsel's statements did not show a change of position from Burton's earlier request to keep the charges bundled together. The record does not contain any indication that Burton asked to have the charges severed. We conclude he has not preserved error on this claim.

IV. Sufficiency of the Evidence

Burton raises a sufficiency of the evidence claim regarding each of the charges against him. He claims the district court should have granted his motion for judgment of acquittal. We review challenges to the sufficiency of the evidence in a criminal case for the correction of errors at law. *State v. Heuser*,

661 N.W.2d 157, 165 (Iowa 2003). The fact-finder's verdict will be upheld if it is supported by substantial evidence. *Id*. at 165-66. Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). In reviewing challenges to the sufficiency of the evidence we give consideration to all the evidence, not just that supporting the verdict, and view the evidence in the light most favorable to the State. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

A. Burton claims there is insufficient evidence in the record to support his conviction for operating while intoxicated. He does not dispute that he was intoxicated, but asserts there is insufficient evidence that he was operating the vehicle. The term "operate" has been defined as "the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running." *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996) (citations omitted). A defendant's operation of a motor vehicle may be established by circumstantial, as well as direct evidence. *State v. Braun*, 495 N.W.2d 735, 739 (Iowa 1993).

When Officer Ostoj first approached Burton and asked what had happened, Burton stated he had just bought the van and that "everything went out." When asked which direction he had been driving, he stated he was "coming this way," and pointed in the direction he had been walking. From this evidence the jury could infer that Burton had been driving the van.

It is the responsibility of the jury to assess the credibility of witnesses. *See State v. Hopkins,* 576 N.W.2d 374, 377 (Iowa 1998). The jury could have found

Burton's testimony at trial that a hitchhiker he had just met had been driving the van and ran away was not credible. We conclude there is substantial evidence in the record to support the jury's finding that Burton was operating the van.

Burton also claims that even if there is substantial evidence he was operating the vehicle, there is insufficient evidence in the record to support a finding that he was intoxicated at the time he was driving. He claims he could have become intoxicated after the van was already in the ditch. At the trial, however, Burton testified that after the van went into the ditch, "I got up and opened the door and got out that side." He stated that after he got out of the vehicle he started walking on the side of the road. The jury could readily conclude that he did not drink alcohol after driving the van into the ditch.

We determine there is sufficient evidence in the record to support Burton's conviction for operating while intoxicated.

B. Burton claims there is insufficient evidence in the record that he violated the open container law. Section 321.284 provides, "[a] driver of a motor vehicle upon a public street or highway shall not possess in the passenger area of the motor vehicle an open or unsealed bottle . . . containing an alcoholic beverage." The jury was instructed, "the passenger area is defined as any area designed to seat the driver or passengers and is readily accessible to the driver or passenger."[2] *See* Iowa Code § 321.284.

[2] The jury was not instructed that under the statute it is permissible to have an open container in the trunk of a vehicle, and if the vehicle does not have a trunk, an open container "may be transported behind the last upright seat of the motor vehicle." *See* Iowa Code § 321.284. Burton did not object to the jury instruction. Therefore, the instruction became the law of the case. *See State v. Murray*, 796 N.W.2d 907, 910

Officer Ostoj testified there was an open bottle of Hawkeye vodka in Burton's vehicle. He testified another officer conducted the investigation of the vehicle and that officer "did not indicate where exactly in the vehicle it was found." Burton testified he remembered the bottle of vodka, "because everything was thrown around all over the place," presumably when the van went into the ditch. Burton stated the van had two bucket seats in the front and was open in the back.

The evidence clearly shows there was an open bottle of alcohol in the vehicle. The only question is whether there is sufficient evidence it was in "any area designed to seat the driver or passengers and [was] readily accessible to the driver or passenger." We find no evidence in the record that the open bottle of vodka was in the passenger area of the van as defined in the instruction, "readily accessible to the driver or passenger." Officer Ostoj testified he did not know where the bottle had been inside the van. Burton's testimony also showed only that the bottle was within the van. We conclude there is insufficient evidence to support the conviction for open container. We reverse Burton's conviction on this charge.

C. Burton claims there is insufficient evidence he was operating without a valid driver's license, in violation of section 321.218. He states that there was no documentary proof or verification by the Iowa Department of Transportation that his license had been suspended.

(Iowa 2011) (noting that if there is no objection, an incorrect instruction becomes the law of the case).

Officer Ostoj testified that he verified Burton's driver's license was suspended first by contacting dispatch, and then checking Burton's license record after he arrived at the jail. The officer testified that based on his own investigation he determined Burton was driving while his license was suspended. We conclude there is substantial evidence in the record to support the jury's determination that Burton was operating without a valid driver's license.

D. Burton additionally claims there is not sufficient evidence to show he failed to possess proof of insurance, as required by section 321.20B. On this issue Officer Ostoj testified, "He wasn't able to state that he did have it, and we couldn't find any upon inventory of the vehicle. It wasn't found." The officer also testified that he later asked Burton if he had insurance. Burton asserts that the failure to find insurance documentation does not constitute proof beyond a reasonable doubt that he did not have insurance on the vehicle.

A citation may be issued to a driver, "[i]f a peace officer stops a motor vehicle registered in this state and the driver is unable to provide proof of financial liability coverage." Iowa Code § 321.20B(4). Thus, the citation arises based on a driver's failure to provide proof of insurance coverage. In this case, there is substantial evidence in the record to show that despite being asked whether he had insurance Burton was unable to provide proof of financial liability coverage. We conclude his conviction of this offense is supported by sufficient evidence.

V. Ineffective Assistance of Counsel

Burton contends he received ineffective assistance from his trial counsel. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

A. Burton asserts he received ineffective assistance because defense counsel failed to object to the fact that two jury instructions were identical.[3] These instructions both set forth the elements for the offense of failure to provide proof of insurance. Burton asserts the repetitive instructions unfairly highlighted this charge and unduly emphasized the State's evidence.

Giving the two "identical" marshalling instructions was a mistake. However, only one verdict form concerning failure to provide proof of insurance was submitted to the jury, the jury would no doubt understand the second marshalling instruction was duplicative and submitted in error, and Burton was found guilty of only one count of driving without proof of insurance. Burton has not shown he was prejudiced by the duplicative instructions. We conclude he

[3] The two jury instructions contain one small difference. The first jury instruction states, "If the State has failed to prove either of the elements, the defendant is not guilty." The second instruction provides, "If the State has failed to prove either of the elements, the defendant is not guilty [of] driving without insurance." We find this small difference to be without any practical effect.

has not shown that he received ineffective assistance due to counsel's failure to object to these jury instructions.

B. Burton asserts he received ineffective assistance because defense counsel failed to object on hearsay grounds to testimony by Officer Ostoj that his driver's license was suspended. Officer Ostoj testified he verified Burton's license was suspended by contacting dispatch and then later himself checking Burton's driver's license record. The driver's license records are not inadmissible on hearsay grounds. *See State v. Shipley*, 757 N.W.2d 228, 234 (Iowa 2008) (noting Iowa Rule of Evidence 5.803(8)(*A*) allows admission of hearsay contained in public records setting forth its regularly conducted and reported activities, such as revocation of driving privileges). The officer's testimony about those records, however, would constitute hearsay. *See id*.

The record is inadequate in this direct appeal to determine whether counsel had a strategic reason for failing to object to the hearsay testimony. *See State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) ("[P]ostconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance."). Where the record is not adequate to address a claim of ineffective assistance of counsel in a direct appeal then the issue must be preserved for postconviction proceedings. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). We decline to rule on Burton's claim of ineffective assistance based on counsel's failure to object to hearsay testimony and preserve the issue for a possible postconviction relief proceeding.

C. Burton contends his rights under the Confrontation Clause were violated by counsel's failure to object to Officer Ostoj's testimony concerning his driving records. He points out that under the Confrontation Clause out-of-court testimonial statements should be admitted into evidence only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 69, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 198 (2004).

The Iowa Supreme Court has determined that a driving record is "nontestimonial" under *Crawford*, and it is admissible without the testimony of a live witness. *Shipley*, 757 N.W.2d at 238. The driving records were not created for this prosecution, but were created based on "routine, ministerial tasks in a nonadversarial setting pursuant to a statutory mandate." *See id*. at 237. The Confrontation Clause is not applicable, and defense counsel was not ineffective due to failure to object on the basis of the Confrontation Clause.

D. In his appellate brief, Burton asks that if we have found failure to preserve error on any issue that we then address the issue on the basis of ineffective assistance of counsel. We have determined Burton failed to preserve error on his claim that the court should have severed the simple misdemeanor charges from the OWI charge.

A random mention of an issue, without elaboration or supportive authority, is not sufficient to raise the issue for review. *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Auth.*, 641 N.W.2d 776, 785 (Iowa 2002). "[I]ssues are deemed waived or abandoned when they are not stated on appeal

by brief; random discussion of difficulties, unless assigned as issue, will not be considered." *Hubby v. State*, 331 N.W.2d 690, 694 (Iowa 1983). Furthermore, where there has been a failure to state, argue, or cite authority in support of an issue, the issue is considered waived. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001).

We conclude the Burton has not adequately raised this issue on appeal. We note the claims of ineffective assistance of counsel may be raised in postconviction proceedings whether or not they have been raised in a direct appeal. *See Johnson*, 784 N.W.2d at 198.

In the issues addressed in this direct appeal, Burton has not shown he received ineffective assistance of counsel.

VI. Conclusion

We affirm Burton's convictions for OWI, operating without a valid driver's license, and failure to provide proof of financial liability coverage. We reverse his conviction for open container.

AFFIRMED IN PART, AND REVERSED IN PART.