**IN THE COURT OF APPEALS OF IOWA**

No. 1-747 / 10-1873
Filed November 9, 2011

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**AARON JOSEPH WEILAND,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, Judge.

Aaron Weiland appeals his judgment and sentence for operating while intoxicated, second offense. **REVERSED.**

Mark C. Smith, State Appellate Defender, Patricia Reynolds, Assistant Appellate Defender, and Renner Walker, Legal Student Intern, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Larry Brock, County Attorney, and Barbara A. Edmondson and Wyatt Peterson, Assistant County Attorneys, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**VAITHESWARAN, P.J.**

Aaron Weiland appeals his judgment and sentence for operating a motor vehicle while intoxicated (OWI), second offense. Weiland raises several arguments for reversal, including an assertion that the evidence was insufficient to establish he was operating the vehicle while under the influence of marijuana. We find this issue dispositive.

The jury considering the charge against Weiland was instructed that the State would have to prove the following: "1. On or about the 29th day of January, 2009, the defendant operated a motor vehicle. 2. At that time, the defendant was under the influence of drugs." With respect to the second element, the jury was further instructed:

> A person is "under the influence" when, by ingesting drugs, one or more of the following is true:
> 1. His reason or mental ability has been affected.
> 2. His judgment is impaired.
> 3. His emotions are visibly excited.
> 4. He has, to any extent, lost control of bodily actions or motions.

Weiland challenges the sufficiency of the evidence on the second element, arguing the State's proof was conflicting and did no more than create speculation as to whether he was under the influence of marijuana. *See State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002) ("The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture."). We will uphold a finding of guilt only if substantial evidence supports it. *Id.* at 75.

A reasonable juror could have found the following facts. A customer at a fast-food restaurant saw Weiland interacting with an employee and thought Weiland seemed intoxicated. The customer went to a nearby police station and

reported his observations. An officer dispatched to the scene watched Weiland leave the restaurant and get into a car. The officer spoke to Weiland but did not observe any of the usual signs of alcohol intoxication. He told Weiland he was free to leave.

On returning to his squad car, the officer received word from the dispatcher that he needed to speak with Weiland further. The officer followed the car, which had since left, stopped it again, and asked Weiland for his driver's license. Weiland did not have one. The officer issued a citation and advised Weiland that he would need to find someone to drive him home. Weiland asked the officer to speak to his girlfriend's parents. The officer did so and, following the conversation, decided to take Weiland to the police station to have him assessed by a drug recognition officer. The officer conceded he saw no signs of slurred speech, difficulty walking, or a green coating on Weiland's tongue. He also conceded he saw nothing indicating disorientation or impairment of judgment. Finally, the officer detected no smell of marijuana.

At the police station, Weiland was evaluated by an officer specially trained to recognize people who are under the influence of drugs or alcohol. This officer initially noted that Weiland appeared agitated. When he asked why, Weiland responded that he was in this situation because of his girlfriend's mother. The officer also asked Weiland if he had used any controlled substances. At first, Weiland said he smoked marijuana about three months earlier. Later, he stated he used the drug three days earlier.

The officer conducted a three-part assessment of Weiland. At trial, he opined that Weiland was under the influence of marijuana. When asked to state

the basis of his opinion, he referred to Weiland's admission that he smoked marijuana and stated that Weiland's performance on certain sobriety tests indicated that he used the drug more recently than three days earlier, as he claimed. The officer specifically cited Weiland's "elevated pulse rates, the elevated blood pressure, his pupil dilation, his performance on the walk-and-turn, [and] the lower body tremors." He also noted Weiland had a gray film and heat bumps on his tongue and stated heat bumps are typically caused by smoking unfiltered substances such as marijuana. Finally, the officer testified that Weiland was asked to provide a urine sample for testing but refused, on the ground the test "would come back dirty."

On cross-examination, the officer admitted Weiland showed no signs of disorientation, impaired perception of time and distance, or increased appetite. He also did not have a marked reddening of the eyes and did not smell of marijuana. The officer stated Weiland "didn't exhibit many of the indicators of cannabis use of someone who has just recently smoked. And recently being within the last two to three hours."

As noted, the jury was instructed that "under the influence" could be proved in several ways. The State essentially concedes the first three signs were not present and focuses instead on the fourth sign: whether the defendant "has, to any extent, lost control of bodily actions or motions." The State points to the following evidence adduced by the officer conducting the drug assessment:

> 1) Weiland's eyes would not converge; 2) he had eyelid tremors; 3) his pupils were dilated and he had rhythmic pulsation, called rebound dilation; 4) both his legs had tremors; 5) he failed the walk and turn test because he did not stay in position, he stopped midway, and did not turn as instructed; (6) he failed at

> touching his finger to his nose because he used the wrong part of his finger and the wrong hand once; 7) his blood pressure was elevated; 8) his pulse was elevated; and 9) he exhibited quick, nervous movements.

The problem with the State's argument is that these observations were completely divorced from the required "operating a motor vehicle" element. Weiland was not taken to the police station on the basis of any observations of erratic driving or other signs of impairment. *Cf. State v. Hutton*, 796 N.W.2d 898, 904 (Iowa 2011) ("We have long recognized that the determination of whether a person is under the influence of an alcoholic beverage is focused on the conduct and demeanor of the person, not a numerical test result."); *State v. Walker*, 499 N.W.2d 323, 325 (Iowa Ct. App.1993) ("Walker's manner of driving at the time of the collision and conduct immediately thereafter is relevant to the question of intoxication. . . ."). He was taken to the police station based on a phone conversation between the officer and a parent of his girlfriend. Once there, he was subjected to "field" sobriety tests, such as the "walk-and-turn" and "one-leg stand" tests, to determine whether he was "under the influence" of drugs. These tests were performed in a vacuum, absent any suspicion that Weiland had been driving under the influence. This fact alone renders the jury's finding of guilt unsupported by substantial evidence.[1]

[1] The State could have alternately relied on a code provision that presumes intoxication based on the presence of "*any amount* of a controlled substance . . . as measured in the person's blood or urine." Iowa Code § 321J.2(1)(c) (2009) (emphasis added); *State v. Comried*, 693 N.W.2d 773, 774 (Iowa 2005); *see also* Matthew C. Rappold, *Criminal Law—Evidence of Inactive Drug Metabolites in DUI Cases: Using a Proximate Cause Analysis to Fill the Evidentiary Gap Between Prior Drug Use and Driving Under the Influence*, 32 U. Ark. Little Rock L. Rev. 535, 537 (2010) (noting Iowa is one of sixteen states that have enacted per se laws creating a presumption of impairment based on the presence of any detectible amount of drugs or drug metabolites). As noted, Weiland declined to provide a urine sample and there is no

But, assuming without deciding that it was appropriate to administer field sobriety tests at the police station without reasonable suspicion that Weiland was driving under the influence, the evidence concerning Weiland's performance on some of the tests did not support an "under the influence" finding. For example, with respect to Weiland's inability to "converge" or cross his eyes, the officer admitted "[s]ome people do have the inability to cross their eyes." Given this admission, the fact that Weiland could not cross his eyes says nothing about whether he had control of his bodily actions or motions. The eye tremors cited by the State are even more irrelevant, as the officer testified that he noted them but "didn't count it against [Weiland]."

We concede Weiland's dilated pupils were relevant because, according to the officer, they were "associated with cannabis." But Weiland only "had dilated pupils on room light and direct lighting." These were not the conditions when Weiland was stopped after 8:00 p.m. in the month of January. Significantly, the officer stated that, in total darkness, Weiland's pupils were "within the normal range, but at the high end of the near normal range."

It is true that Weiland also exhibited "rebound dilation," which was not connected to a particular amount of light. At best, this evidence corroborated Weiland's admission that he used marijuana; it said nothing about Weiland's loss of control of his bodily actions or motions at or around the time he was operating a motor vehicle.

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indication that officers invoked, or could have invoked, implied consent procedures to obtain a sample. *See* Iowa Code § 321J.6(3) (stating if an officer "has reasonable grounds to believe that the person was under the influence of a controlled substance, a drug other than alcohol, or a combination of alcohol and another drug, a blood or urine test shall be required even after another type of test has been administered").

The officer's reference to leg tremors is similarly of minimal probative value. This observation was made in connection with the one-leg stand test. Notably, Weiland did not display the "four standardized clues" associated with this test: 1) placing the foot down, 2) hopping, 3) swaying, or 4) raising one's arms more than six inches from his side. Any of these standardized clues could have reflected a loss of control of bodily actions or motions. While the officer stated that leg tremors were "associated with central nervous system stimulants and cannabis," he did not explain how the tremors, exhibited while Weiland was standing on one leg, evinced a loss of control of his bodily actions or motions.

The officer's testimony concerning the walk-and-turn test was potentially the most probative evidence on the question of undue influence. The officer said he told Weiland to maintain "the instructional stance," which required him to stand with his feet together on a line. Weiland stood with his feet apart. The officer also instructed Weiland to take a total of twenty-seven heel-to-toe steps, turning after the first set of nine. The officer stated Weiland "stopped walking on step numbers 2 and 3 of the second set of nine steps, and then he completed an incorrect turn by simply pivoting on one foot." This evidence might have amounted to substantial evidence of a loss of control of bodily actions or motions had there been any evidence of impairment at the scene of the vehicle stops. Without such evidence, we cannot say that Weiland's wide stance, two stops, and improper turn, all while walking a straight line, established that he drove while under the influence. *See* Scott Brown, *The D.R.E.: Drug Recognition Expert or Experiment?*, 69 UMKC L. Rev. 557, 568–69 (2001) ("Of course, while it is illegal for the driver to have taken the drugs that were found in his system, it

is critical to recognize that he is not being charged in these cases with possession or use of drugs. Rather, the charge involved is driving while impaired by drugs.").

The same holds true for the finger-to-nose test. With respect to this test, the officer stated Weiland

> missed the tip of his nose three out of the six times; [h]e used the pad of the finger and not the tip on all of his touches; and then when instructed on that fifth one to use the right, he started with his left, but he corrected himself and touched with the right.

When asked about the significance of these clues, the officer responded, "Once again, you're just looking for the divided attention, their ability to process information and perform the tests." We agree the result of this test would have been probative of having lost control of bodily actions and motions, had the test been performed at the scene based on a suspicion that Weiland was driving while impaired. Absent that connection, the test result did not amount to substantial evidence of operating a motor vehicle while under the influence.

As for Weiland's elevated blood pressure and pulse, both the officer and Weiland's expert testified that these factors alone might apply to any person transported to a police station to undergo testing. It is pure conjecture to surmise from these factors that Weiland was driving under the influence of marijuana.

The additional evidence on which the State relied to support the jury's finding of guilt was the presence of heat bumps on Weiland's tongue and Weiland's evolving statements about when he ingested marijuana. With respect to the heat-bump evidence, the officer admitted that smoking unfiltered cigarettes could have the same effect. He also admitted that, during testing, Weiland may

have gone out to have a cigarette. As for Weiland's changing story about when he smoked marijuana, that evidence may reflect a guilty conscience about the ingestion of an illegal substance, but it does not establish that Weiland lost control of his bodily actions or motions at the time he was driving. *See* Iowa Code § 321J.2(1).

In sum, the State's evidence in support of the element that Weiland was "under the influence" was not substantial because it was not tied to Weiland's operation of a motor vehicle. As the evidence supporting this key element was insufficient, we reverse the jury's finding of guilt for operating a motor vehicle while intoxicated. Because our conclusion forecloses retrial, *see State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003), we find it unnecessary to address the remaining arguments raised by Weiland.

**REVERSED.**