IN THE COURT OF APPEALS OF IOWA

No. 3-539 / 12-0562
Filed September 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDRE MICHAEL LAFONTAINE,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Paul B. Ahlers, District Associate Judge.

Defendant appeals his convictions for operating while intoxicated, second offense, and eluding. **AFFIRMED.**

Chad R. Frese of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Randall J. Tilton, County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

HUITINK, S.J.

I. Background Facts & Proceedings.

On November 28, 2010, at about 2:00 a.m., Officer Lance Lemke of the Iowa Falls Police Department observed a vehicle drive by, in which the driver did not have his seatbelt fastened. Officer Lemke pulled out behind the vehicle in his marked patrol car with the red and blue lights flashing. He activated his siren for about thirty-five to forty seconds, but then accidentally disabled it and proceeded to use his air horn. The vehicle did not stop.

Another officer, Joe Mets, approached, and Officer Lemke advised Officer Mets his siren was not working. Officer Mets, who was also in a marked patrol car, activated his siren and lights. The officers tried on three occasions to get the vehicle stopped by trapping it between their patrol cars, but the vehicle did not stop. After traveling about one-half mile from where Officer Lemke initially tried to stop the vehicle, it pulled into a driveway.

The officers approached the vehicle and told the driver, Andre Lafontaine, to get out of the vehicle. Lafontaine would not comply. Eventually, one of the officers broke a window in the vehicle, and a "dry stun" with a Taser was administered. Lafontaine still would not respond to verbal commands so the "dry stun" was administered again. After Lafontaine was removed from the vehicle, he wrestled with the officers before they could get him handcuffed. Lafontaine was arrested for eluding at 2:13 a.m.

While Officer Lemke was transporting Lafontaine to the police station, he noticed Lafontaine had bloodshot eyes and an odor of alcohol. Lafontaine

agreed to field sobriety tests. He failed the horizontal gaze nystagmus test, showing six out of six clues. He also had evidence of impairment on the nine-step walk and turn and one-leg stand tests. At 3:03 a.m., Lafontaine had a breath test which showed an alcohol level of .121.

On December 14, 2010, Lafontaine was charged with operating while intoxicated (OWI), in violation of Iowa Code section 321J.2 (2009), second offense, and eluding, in violation of section 321.279(1). After a jury trial on December 1, 2011, he was found guilty of both offenses. He was sentenced to 180 days in jail on each charge, with all but twelve days suspended, to be served concurrently and placed on probation. Lafontaine now appeals, claiming there is insufficient evidence in the record to support his convictions.

II. Standard of Review.

We will review a challenge to the sufficiency of the evidence for the correction of errors at law. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). The fact-finder's verdict will be upheld if it is supported by substantial evidence. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). Substantial evidence means evidence that could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *State v. Heuser*, 661 N.W.2d 157, 165-66 (Iowa 2003). 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).

III. Merits.

A. Lafontaine first claims there is insufficient evidence in the record to support his conviction for OWI. He states that while there was evidence he had an alcohol level of .121 at 3:03 a.m., this does not show he was above the level of .08 nearly one hour earlier when he was driving.

Iowa Code section 321J.2(8)(a)[1] provides:

> The alcohol concentration established by the results of an analysis of a specimen of the defendant's blood, breath, or urine withdrawn within two hours after the defendant was driving or in physical control of a motor vehicle is presumed to be the alcohol concentration at the time of driving or being in physical control of the motor vehicle.

This section allows a rebuttable presumption in any criminal prosecution under section 321J.2 that if a test is given within two hours after a defendant was driving, the result of the test is presumed to be the defendant's alcohol concentration at the time the defendant was driving. *State v. Walker*, 804 N.W.2d 284, 290 (Iowa 2011). "The focus of section 321J.2(8)(a) is expressly upon the concentration of alcohol in the defendant's body *at the time of driving* because that is the temporal focus of a charge filed under section 321J.2(1)." *State v. Iowa Dist. Ct.*, 730 N.W.2d 677, 680 (Iowa 2007).

Lafontaine claims he rebutted the presumption found in section 321J.2(8)(a) through his cross-examination of the State's expert, James Bleskacek, a criminalist with the Iowa Division of Criminal Investigation. Bleskacek testified that while a person is still absorbing alcohol, a person's breath test would be higher than the amount of alcohol in the person's blood.

[1] This section was renumbered as section 321J.2(12)(a), effective December 1, 2010. *See* 2010 Iowa Acts ch. 1124, §§ 1, 9.

Lafontaine asserts he could have been in the absorptive phase of alcohol consumption at the time he had the breath test so the test showed more alcohol than was in his body.

Bleskacek also testified, however, that during the absorptive phase a breath test would not give a significantly higher reading than the level of alcohol in the person's blood. Furthermore, there is no evidence to show Lafontaine was actually in an absorptive phase at the time he took the breath test. During a post-absorptive phase, a breath test would show a lower level of alcohol than a blood test. There was no evidence to show when Lafontaine had his last drink before his breath test, how many drinks he consumed, or how much food was in his stomach. These are all factors that affect whether a person is in an absorptive or post-absorptive phase.

A presumption is rebutted when facts to the contrary establish, as a matter of law, the presumed facts to not exist. *Dyson v. Dyson*, 25 N.W.2d 259, 261 (Iowa 1946). Lafontaine has not established facts contrary to the presumption in section 321J.2(8)(a) as a matter of law. His claim of rebuttal relies entirely on speculation. We conclude the jury's verdict finding Lafontaine guilty of OWI is supported by substantial evidence.

B. Lafontaine also claims there is insufficient evidence in the record to support his conviction for eluding. The offense of eluding is found in section 321.279(1), as follows:

> The driver of a motor vehicle commits a serious misdemeanor if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle driven by a uniformed peace officer after

> being given a visual and audible signal to stop. The signal given by the peace officer shall be by flashing red light, or by flashing red and blue lights, and siren.

Lafontaine points out that Officer Lemke's siren stopped working. He asserts the use of an air horn does not meet the specific requirements of section 321.279(1).

Officer Lemke testified he was wearing his uniform and driving a marked patrol car on November 28, 2010. When he observed Lafontaine driving without a seatbelt, he activated his red and blue flashing lights. He turned on his siren for thirty-five to forty seconds, but accidentally bumped the standby button, which turned it off. When Officer Mets approached, Officer Lemke told Officer Mets his siren was not working. Officer Mets then drove behind Officer Lemke in a marked patrol car, with the emergency lights and siren activated.

Even after Lafontaine was followed by two marked police cars, both with their emergency lights flashing, and one with its siren on, Lafontaine failed to stop. We conclude there is sufficient evidence in the record to show Lafontaine was given a visual and audible signal to stop. We determine there is substantial evidence in the record to support the jury's verdict finding Lafontaine guilty of eluding.

We affirm defendant's convictions for OWI, second offense, and eluding.

AFFIRMED.