IN THE COURT OF APPEALS OF IOWA

No. 0-871/ 09-1859
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEREK JAMES KARDELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III (suppression) and James S. Heckerman (trial), Judges.

Derek Kardell appeals from his conviction of two counts of homicide by vehicle by operation while intoxicated. **AFFIRMED.**

Matthew T. Lindholm of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Christine Shockey, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

Derek Kardell appeals from his conviction of two counts of homicide by vehicle by operation while intoxicated. Kardell contends: (1) the officers did not have "reasonable grounds" to invoke implied consent to a blood test; (2) lack of notice of the blood test results and destruction of his blood sample requires the evidence to be suppressed; (3) the evidence was insufficient to support his conviction due to a failure of competent identification evidence; and (4) his trial counsel was ineffective in failing to object to identification testimony. We affirm.

I. Background Facts and Proceedings.

When Officer Rutledge approached this single vehicle accident on October 29, 2007, at 10:00 p.m., he observed a red, single-cab pickup truck. The truck had failed to stop at a stop sign and failed to negotiate a T-intersection. The truck was smashed in a ditch with the driver's-side heavily damaged and resting next to a culvert. Kardell, the truck's registered owner, was in the driver's seat with his upper body hanging out of the broken driver's-side window. Kardell was unconscious and was bleeding profusely. Next to Kardell on the bench seat were two females and unconscious Ross Pattee.

Numerous open and closed beer cans littered the ground and were scattered throughout both the inside and the bed of the pickup. A beer can in a koozie (insulation for the can) was wedged in the steering wheel.

The scene was chaotic as medical personnel arrived. Neither the driver's door nor the passenger door could be opened. Officer Rutledge broke out the back window so EMT personnel could access the truck's occupants and check

pulses. Eventually, the Jaws of Life were used to remove the passenger door so people could be removed from the truck. Kardell was the last person removed due to being closest to the driver's door with the other passengers forced against his body. Kardell was taken by helicopter to Creighton Hospital and Pattee was taken by ambulance to a local hospital. Medical personnel determined the female passengers were dead at the scene.

Next, Officer Weber arrived on the scene. Informed Kardell was the driver, Officer Weber requested Officer Amdor go to Creighton Hospital and invoke implied consent to test Kardell's blood. Officer Weber testified he had reasonable grounds to invoke implied consent:

> [W]e have a single vehicle accident with fatalities, there were open cans of alcoholic beverages in the vehicle and around the vehicle and my duty is to, therefore, check impairment, because it's an easy intersection. That's the first accident I've ever had there since I've worked there.

Further, Officer Weber stated the roadway was dry and there did not appear to be any other weather factor or factors other than driver error contributing to the accident.

When Officer Amdor arrived at the hospital, he was advised he could not invoke implied consent because Kardell was being treated. Officer Arkfeld arrived at the hospital to relieve Officer Amdor and continued waiting during Kardell's treatment. Eventually, Officer Arkfeld obtained a doctor's certification Kardell was unconscious and unable to refuse implied consent. Four hours after the accident a doctor took a sample of Kardell's blood. Officer Arkfeld then mailed the sample to the Division of Criminal Investigation (DCI) lab for testing.

Officer Arkfeld testified it is normal procedure to leave a copy of the implied consent form in the defendant's property stating blood was taken, but he could not specifically "remember whether I did or did not. But that is our procedure."

When Officer Bennett arrived at the accident scene the truck was still in the ditch and he took photos and video of the scene. Officer Bennett's job was "to reconstruct or figure out the accident." Officer Bennett testified he received a phone call from Kardell's attorney the day after the accident and was advised not to talk to Kardell.

Kardell's blood alcohol concentration at the time of testing was .07. The DCI lab has an established policy to destroy blood samples after ninety days unless it receives a request to retain the samples. The November 14, 2007 DCI report sent to Officer Arkfeld states: "The above evidence in this case will be destroyed 90 days from the date of this report unless other arrangements are made with the DCI Evidence Room." The DCI's policy is necessary because the lab does not have enough room to indefinitely store the numerous blood samples it tests.

The county attorney's office also received a copy of the report. Neither the sheriff's office nor the county attorney's office sent a copy of the DCI report to Kardell. Because no request to retain the sample was received, Kardell's blood sample and test kit were destroyed in March 2008.

In May 2008, the county attorney's office sent the DCI information to an expert toxicologist. Through a retrograde extrapolation calculation, the expert

determined Kardell's blood alcohol concentration at the time of the crash was between .11 and .13.

On August 27, 2008, Kardell was charged with vehicular homicide. Kardell requested preservation of the blood sample on December 5, 2008, months after it had been destroyed. In August 2009, Kardell's motion to suppress evidence relating to the blood sample was denied by the district court.

At the bench trial in October 2009, Kardell presented expert testimony that retrograde extrapolation analysis is not reliable. He also offered evidence a "stop ahead" warning sign was missing on the road leading to the intersection. Other evidence at trial established the warning sign was not missing. Additional evidence proved Ross Pattee made two separate purchases of beer before the 10:00 p.m. accident and a cooler was present in the back of Kardell's truck. In finding Kardell guilty of two counts of homicide by vehicle by operation while intoxicated, the court, at the conclusion of the case, stated:

> Beer is purchased at 6:00, it's consumed over a three-hour period. More beer is purchased at 9:00, and at the time of the accident, there were beer cans, and the brands of beer all match up with respect to the beer that was purchased. It seems common sense would tell you that over that four-hour period of time a substantial amount of alcohol was consumed by Derek.
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> . . . .
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> [I]n terms of determining whether or not he was over .08, the Court is confident that has been established beyond a reasonable doubt by the State.
>
> Even despite that, just for those situations where we have no test . . . the Court [can] determine whether or not someone was just under the influence, not by virtue of some type of blood alcohol concentration but by virtue of whether or not they're under the influence. Obviously, Derek had been drinking.
>
> And there's a stock jury instruction, what we can look at to determine whether or not a person is under the influence, including his reason or mental ability has been affected, his judgment is

> impaired, his emotions are visibly excited, he has, to any extent, lost control of bodily actions or emotions. A couple of these things we simply don't have. The one with respect to his emotions . . . .
>
> But I do have the circumstances that indicate how that vehicle was operated over the last 150 feet or the last 200 feet before impact, and that is not consistent with someone who was sober and has their vehicle under control.
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> There was nothing wrong with the roadway that night. There wasn't snow. There wasn't ice. There wasn't rain. There wasn't a problem with visibility. The only conclusion the Court can come up with is that Derek's ability to operate that vehicle was impaired by virtue of his consumption of an alcoholic beverage.
>
> For those reasons, the Court finds that the defendant has been proven guilty, beyond a reasonable doubt, by the evidence that's been submitted here . . . .

The court's later written opinion found:

> In addition, [Kardell] was impaired at the time of the accident. The manner of operation of [Kardell's] vehicle showed impaired judgment, impaired motor control, and impaired perception. [Kardell] failed to stop at an intersection he could easily see from 534 feet away, and did not even react to the environment until approximately 140 feet prior to impact. [Kardell's] judgment in attempting to navigate a 90-degree turn while traveling in excess of 25–30 miles per hour is also indicative of impairment. There were no road or visibility conditions that contributed to the accident, and the absence of a warning sign, if such was the case, also did not contribute to the accident, as such a warning sign is not even required under Iowa law.

This appeal followed.

II. Scope of Review.

To the extent Kardell's "reasonable grounds" and notice of test results issues present a question of statutory interpretation; our review is for correction of errors at law. *State v. Palmer*, 554 N.W.2d 859, 864 (Iowa 1996). We also review challenges to the sufficiency of the evidence for errors at law. *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008).

Kardell alleges his federal and state constitutional due process rights were violated when the blood sample was destroyed. We review de novo. *State v. Harriman*, 737 N.W.2d 318, 319 (Iowa Ct. App. 2007). We are not bound by the district court's determinations, but we may give deference to its credibility findings. *Id.* We evaluate Kardell's ineffective assistance of counsel claim by evaluating the totality of the relevant circumstances in a de novo review. *State v. Lane*, 726 N.W.2d 371, 392 (Iowa 2007).

III. Suppression—Reasonable Grounds.

Kardell argues the police did not have reasonable grounds to believe he was driving while intoxicated. He points out there was no evidence that he "had slurred speech, blood shot eyes, or any other physical manifestations of intoxication." He also asserts no one at the scene "smelled any alcohol" on him and "no attempts were made to determine if the beer cans were cold to the touch, had beer in them, smelled of alcohol, had fingerprints, or had otherwise been recently consumed."

Iowa's implied consent statute creates "a statutory presumption of consent to testing that arises only as to those drivers whom the officers have *reasonable grounds to suspect* have driven under the influence of alcohol." *State v. Christianson*, 627 N.W.2d 910, 912 (Iowa 2001) (emphasis added); Iowa Code § 321J.6(1) (2007). The court's use of the word "suspect" reveals that the statutory standard (operation "which gives reasonable grounds to believe") is a preliminary assessment. *See id*. An unconscious person "is deemed not to have withdrawn" implied consent and may be tested if a licensed professional "certifies in advance

of the test that the person is unconscious . . . rendering that person incapable of consent or refusal." Iowa Code § 321J.7.

"The reasonable grounds test is determined under the facts and circumstances known to the officers at the time the implied consent law is invoked." *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996). We examine the "then-existing" reasonable grounds and do not allow this evidence "to be bolstered by later-acquired evidence." *Christianson*, 627 N.W.2d at 914. "The reasonable grounds test is met when the facts and circumstances known to [Officer Weber] at the time action was required would have warranted a prudent person's belief that an offense has been committed." *See State v. Braun*, 495 N.W.2d 735, 738–39 (Iowa 1993). This test is objective. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682, 685 (Iowa 1976).

A defendant is "under the influence" when one or more of the following factors is true: "(1) the person's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions." *In re S.C.S.*, 454 N.W.2d 810, 814 (Iowa 1990).

We find no merit to Kardell's complaint there was not reasonable grounds for testing because the officers found no physical manifestation of intoxication. Kardell was unconscious, seriously injured, and rushed to the hospital in a helicopter. Kardell was not in any condition for the officers to attempt to detect physical manifestations of intoxication. Likewise, the officers were focusing on

saving lives, not whether or not the numerous beer cans were cold or warm. We agree with and adopt the district court's resolution of this issue:

> [R]easonable grounds existed for the officer to believe [Kardell] was operating the vehicle under the influence of alcohol. The vehicle was registered to Kardell and [he] was seated on the driver's side of the vehicle when officers arrived on the scene. It appeared the driver failed to navigate the intersection properly, causing the vehicle to skid, strike a stop sign and then run head on into an embankment. This observation indicated impaired judgment and perception. Additionally, multiple open and closed alcohol containers were present inside and outside the vehicle. At least one open container was positioned within reach of the driver. Taken as a whole, reasonable grounds existed to believe [Kardell] was operating the vehicle under the influence.

IV. Suppression—Notice of Test Results and Destruction of Sample.

A. Notice of Test Results.

Kardell argues the district court should have suppressed the blood test results because the State deprived him of the opportunity to obtain an independent chemical test by "the fact that Mr. Kardell was never given notice of the blood test results."

Iowa Code section 321J.11 provides that a person undergoing a blood, breathe, or urine test has the right to conduct an independent test:

> The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of evidence of the results of the tests or tests administered at the direction of the peace officer. Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person.

However, "[o]fficers are not required to advise a defendant of the statutory right to an independent test." *State v. Wootten*, 577 N.W.2d 654, 655 (Iowa 1998).

Therefore, section 321J.11 does not impose a sua sponte duty to provide Kardell with the test results; rather, the only statutory duty is to provide the results upon Kardell's request. *See* Iowa Code § 321J.11. The statute specifically instructs Kardell's "failure or inability . . . to obtain an independent chemical test . . . does *not* preclude the admission" of the testing results. *Id*. (emphasis added).

Further, the failure to sua sponte provide Kardell with notice of the test results is not "police hindrance of independent testing" requiring suppression. *See Casper v. Iowa Dep't of Transp.*, 506 N.W.2d 799, 802 (Iowa Ct. App. 1993) (holding police misconduct in denying defendant's requested independent blood test would require suppression of police-administered breath test in criminal prosecution). We conclude neither Iowa statutory law[1] nor Iowa case law requires suppression of the State's test results.

B. Destruction of Blood Sample.

Kardell also argues the district court should have suppressed the blood test results because the destruction of the blood sample violated his due process rights. Kardell contends he is not required to prove "bad faith" and, alternatively, he contends bad faith is implied by the State's using "the evidence to obtain an

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[1] Kardell also argues Iowa Code sections 809.2 (disposition of seized property) and 80.39 (disposition of personal property) place specific duties on law enforcement and the DCI. Kardell admits "no Iowa case provides guidance," but asserts section 809.2 "imposed a duty to provide him with notice that his blood had been taken." *See* Iowa Code § 809.2. Kardell also asserts section 80.39 required the DCI to notify him of the receipt of his blood sample and prohibits destruction of the sample without proper notification to him. *See* id. § 80.39. Kardell concludes the State's failure to follow these statutes deprived him of the opportunity to obtain an independent test and requires suppression of the blood test results. These statutory arguments were not brought before the district court and, therefore, will not be considered for the first time on appeal. *See Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002).

incriminating expert opinion and destroy[ing] that same evidence before the defense could take their work and conclusions to task." In denying Kardell's due process claim, the district court ruled:

> [T]here is no indication any police misconduct was involved that would require suppressing the test results obtained by the state. Additionally . . . normal procedures were employed at the DCI lab for carrying out the test and destroying the evidence. The official report issued by the DCI lab clearly states the evidence will be destroyed 90 days after the report was issued, a reasonable and apparently standard procedure employed by the lab. Although [Kardell] did not receive notice of the results, the Court is unaware of any authority putting forth such a requirement. Nothing before the Court indicates the results of the State's test should be suppressed because [Kardell] failed to obtain an independent test before the blood sample and test kit were destroyed.

After our de novo review, we agree with the district court. Due process requires criminal prosecutions to "comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532, 81 L. Ed. 2d 413, 419 (1984). The *Trombetta* court analyzed "whether the Due Process Clause requires law enforcement agencies to preserve breath samples of suspected drunken drivers in order for the results of breath-analysis tests to be admissible in criminal prosecutions." *Id*. at 481, 104 S. Ct. at 2530, 81 L. Ed. 2d at 417. The court stated it had "never squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants." *Id*. at 486, 104 S. Ct. at 2533, 81 L. Ed. 2d at 420. The court established the following standard for the State's duty to preserve evidence:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.
>
> To meet this standard of constitutional materiality . . . evidence must both possess an exculpatory value that was

> apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. at 488–89, 104 S. Ct. at 2534, 81 L .Ed. 2d at 422. In ruling there was no due process violation, the *Trombetta* court also focused on the State's intent, stating in failing to preserve the breath samples, the officers were acting in "good faith" and following "their normal practice." *Id*. at 488, 104 S. Ct. at 2533, 81 L. Ed. 2d at 422.

Four years later, the court further discussed the State's duty to preserve evidence in *Arizona v. Youngblood*, 488 U.S. 51, 59, 109 S. Ct. 333, 338, 102 L. Ed. 2d 281, 290 (1988) (holding failure of police to preserve potentially useful evidence, i.e., semen samples, is not a denial of due process absent the defendant's showing bad faith on the part of the police). The court acknowledged its decision in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215, 218 (1963), in which it held the due process clause "makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence." *Youngblood*, 488 U.S. at 57, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. But, the *Youngblood* court ruled the due process clause

> *requires a different result* when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that *it could have been subjected to tests*, the results of which might have exonerated the defendant.

Id. (emphasis added). The *Youngblood* court was unwilling to "read the 'fundamental fairness'" due process requirement to impose on the State an "absolute duty to retain and to preserve all material that might be of conceivable

evidentiary significance in a particular prosecution." *Id*. at 58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. Accordingly, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve *potentially useful* evidence does not constitute a denial of due process of law." *Id*. (emphasis added).

The Iowa Supreme Court adopted this standard in *State v. Dulaney*, 493 N.W.2d 787, 791 (Iowa 1992), a drunk driving case in which the defendant sought to suppress test results from a blood withdrawal. Like Kardell, the *Dulaney* defendant argued the State violated his United States and Iowa due process rights by destroying his blood sample before he was able to have it independently tested. *Dulaney*, 493 N.W.2d at 790. The *Dulaney* court discussed and applied the standards established in *Trombetta* and *Youngblood*. *Id*. at 790–91. The *Dulaney* court specifically recognized the requirement a criminal defendant show bad faith on the part of the State and found "there is no evidence the State intentionally destroyed the sample in an effort to deprive Dulaney of evidence as required by *Trombetta* and *Youngblood*. The DCI lab simply destroyed the sample pursuant to its usual procedure . . . ." *Id*. at 791. The court ruled: "[T]he State's blood sample merely could have been subjected to tests, and the results merely might have exonerated Dulaney. This is not enough under *Trombetta* and *Youngblood* to find a violation of Dulaney's due process rights." *Id*. Similarly, Kardell's blood sample "merely could have been subjected to tests" with results that "merely might have exonerated" Kardell. *See id*. This is not enough to find a violation of Kardell's due process rights. *See id*.; *see also State v. Steadman*, 350 N.W.2d 172, 175 (Iowa 1984) (stating "the

failure of the State to automatically furnish an accused with a sample . . . for independent testing is not a denial of due process").

Accordingly, Kardell's assertion he need not prove bad faith is without merit. Further, due to the Iowa Supreme Court's wholesale adoption of *Trombetta* and *Youngblood* in *Dulaney*, a case involving both federal and state due process claims, there is no merit to Kardell's alternative claim that the Iowa due process clause should be more strictly interpreted to require a different result. *See State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000) (holding our state constitution "provides the same due process protections found in the Fourteenth Amendment to the United States Constitution and thus we do not address the state due process claim separately").

As in *Dulaney*, there is no evidence the State acted in bad faith by allowing the blood samples to be destroyed under a neutral policy. Kardell employed his own expert and was able to mount an adequate defense against the charges. *See Steadman*, 350 N.W.2d at 175 (stating "lack of an independent test" is not a due process violation and does not leave a defendant defenseless due to "traditional trial resources including cross-examination and extrinsic evidence"). We conclude Kardell's due process rights were not violated.

V. Insufficient Evidence of Identification.

Defendant Kardell argues the court should have granted his motion for judgment of acquittal because there was insufficient evidence "to provide a sufficient nexus between the person who was driving the vehicle and the person who was charged in the trial information." Specifically, Kardell contends Officer

Rutledge's positive identification of Kardell on direct exam was "rendered useless" on cross-examination because Officer Rutledge admitted his identification was based upon the on-scene statements of Trooper Pigsley and Trooper Pigsley did not testify at trial. *See State v. Brown*, 341 N.W.2d 10, 15 (Iowa 1983) (reversing conviction based on child-victim's out-of-court identification of the defendant when the child did not testify at trial). Kardell asserts there is no other evidence proving beyond a reasonable doubt "that the person accused of the crime is the same person who committed the crime."

Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). "When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record." *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

Even if we completely set aside Officer Rutledge's testimony, the other evidence at trial leaves no reasonable doubt on the identity issue. While "proof of the identity of the person who committed the offense is essential to a conviction . . . identification may be established and inferred from all of the facts and circumstances in evidence." *Butler v. U.S.*, 317 F.2d 249, 254 (8th Cir. 1963) (citations omitted).

First, "a witness need not physically point out a defendant so long as the evidence is sufficient to permit the inference that the person on trial was the

person who committed the crime." *United States v. Alexander*, 48 F.3d 1477, 1490 (9th Cir. 1995) (quoting *United States v. Darrell*, 629 F.2d 1089, 1091 (5th Cir.1980)). Here "*defendant* Kardell" was directly identified by three witnesses at trial as the person involved in the accident.

Andrea Danker testified she is "*the defendant*, Derek Kardell's aunt," and "has known her nephew, Derek Kardell, since he was born." (Emphasis added.) Andrea stated she went to the hospital the night of the accident. Andrea did not testify the defendant, her nephew, was not at the hospital. Additionally, Andrea's father, Don Nelson, made a video, Exhibit 58, and Andrea explained: "Actually, part of the video was created the day after the scene." Further:

> My guess, or my assumption, would be that the original purpose for videotaping was just because we were trying to make sense of the scene. As time went on and more conversations were had about what happened, you know, what happened is Derek, you know, potentially going to be in trouble or whatever . . . .

Andrea's testimony shows the Derek who could potentially be in trouble from the accident at issue is her nephew, defendant Derek Kardell.

Kerry Danker, Andrea's husband, also testified at trial. Kerry stated he knew "Mr. Kardell" because "he's my nephew." Kerry testified:

> Q. . . . [I]s that land that's farmed by the Kardell family? A. By Dale, yes.
> Q. And Dale is who? A. Derek's dad.
> Q. The *defendant's* father? A. Yes. (Emphasis added).

Kerry testified he and his wife were in bed when they received a phone call informing them about the accident. Kerry explained Andrea went to Creighton Hospital that same night while Kerry remained at home with their kids. Further,

Andrea "went to the hospital because of her nephew, Derek, being seriously injured."

During the early morning hours after the accident, Kerry left his kids at home sleeping while he drove past the accident scene. Kerry "knew it was the accident scene because Mr. Kardell's truck was still there" against the embankment. Kerry stated he was not in a position to know "Derek's drinking habits . . . or how frequently he drank prior to the accident." Kerry's testimony also provides a nexus between the Derek who was driving and the Derek who was charged.

"*Defendant* Kardell" was also directly identified in court by Gary Pattee, the father of truck passenger Ross Pattee. Gary stated he knew Derek Kardell as "a friend and a relative." Gary explained he called Ross on the date of the accident and asked him to deliver diesel fuel to the field where Gary was running a combine. The prosecutor asked Gary who was with Ross when he arrived with the fuel. Gary replied, "Derek." The prosecutor then clarified Gary's answer: "Q. The *defendant*, Derek Kardell? A. Yes." (Emphasis added.) After Ross and the defendant delivered the fuel and left the field, Gary stated he moved to a different part of the field and saw Derek's red truck in the yard of his house. Gary's testimony identifies the defendant as the person with his son on the evening of the accident.

The testimony of defendant Derek Kardell's aunt, uncle, and best friend's father provides evidence "sufficient to permit the inference that the person on trial was the person who committed the crime." *See Alexander*, 48 F.3d at 1490.

Second, "the failure of any . . . witnesses to point out that the wrong man had been brought to trial [can be] eloquent and sufficient proof of identity." *Id*. (quoting *United States v. Weed*, 689 F.2d 752, 755 (7th Cir. 1982)). Neither Derek's aunt, uncle, nor best friend's father ever asserted the person on trial was not the Derek Kardell involved in the accident. Further, Ross Pattee testified that he was involved in the October 29 accident and has no recollection of the accident, but he "was in the passenger seat because [he] was treated with some seat belt trauma." Pattee stated Derek Kardell was his best friend and the truck involved in the accident belonged to Derek Kardell. At no time did Ross, the only other survivor of the accident, assert at trial that the wrong man was the defendant or that defendant Kardell was not one of the truck's four occupants.

Third, "in-court identification is not necessary when the defendant's attorney himself identifies his client at trial." *Id.* The court introduced the case as State of Iowa v. Derek James Kardell. Kardell's attorney first asked the court to reconsider the court's adverse ruling on the motion to suppress the blood test evidence, which the court denied.

Kardell's attorney made a brief opening statement in which he once referred to Derek Kardell and on eight occasions referred to Mr. Kardell. Kardell's attorney never alleged the State was trying the wrong Derek Kardell or that defendant Kardell was not one of the truck's four occupants. Rather, he argued: "there are four occupants who are equally—have equal access to the operating mechanisms of the vehicle" and the evidence does not establish that

"Mr. Kardell, to the exclusion of all possible other occupants or all other occupants, had to be the driver." Further:

> [T]he officers who arrived at the scene assumed Mr. Kardell had to be the driver . . . . They did not do any subsequent forensic investigating . . . to prove . . . the potential positioning of the occupants before the impact, the pre-impact position.

Accordingly, defense counsel's statements indicate defendant Kardell was one of the occupants of the crashed truck.

Fourth, proper identity can be inferred when the defendant does not complain the wrong person has been brought to trial. *See Butler v. United States*, 317 F.2d 249, 254 (8th Cir. 1963). The Derek Kardell seated in the courtroom never complained he was not the same Derek Kardell whose truck crashed in October 2007. Accordingly:

> It is inconceivable that [Kardell] would have sat mute and subjected [himself] to the ordeals of the lengthy trial if [he] had sincerely and in good faith believed [he was] being tried for an offense with which [he was] completely disassociated.

See id. Defendant Kardell did not raise the identity issue at arraignment, in a pretrial motion to dismiss, or in his opening statement to the court. The fact defendant Kardell subjected himself to extensive pretrial proceedings, a four-day trial, and the expense of hiring an expert witness allows the district court to reasonably infer the correct Derek Kardell was on trial.

Finally, and convincingly, defendant Kardell and the State stipulated:

> 5. Dr. Lokesh Bathla, MD, is a licensed physician . . . and he certified in advance of executing a blood draw at the request of [Officer] Arkfeld, that *the Defendant herein, Derek James Kardell, was unconscious* or otherwise incapable of consent or refusal, within the meaning of Iowa Code § 321J.7.

> 6. *The Defendant herein, Derek James Kardell, was identified by Dr. Lokesh Bathla* prior to the blood draw on October 30, 2007, and the blood draw was conducted in accordance with established medical procedures and otherwise done properly. Furthermore, nothing was done by medical personnel that would have affected the results of a later alcohol analysis performed on the blood. A proper chain of custody of the blood from Dr. Bathla to [Officer] Arkfeld exists, and the certification by Dr. Bathla contemporaneously with the blood draw, which is State's Exhibit 8, is admissible without further foundation.
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> 7. The videotape created by Don Nelson [Andrea Danker's father], which is State's Exhibit 58, is admissible without further foundation.

(Emphasis added.)

We conclude the State presented substantial evidence to support the identity element: the Derek Kardell on trial is the same Derek Kardell whose drunken driving caused two deaths.

VI. Ineffective Assistance of Counsel.

Kardell's final argument is he received ineffective assistance of counsel. Kardell asserts Officer Rutledge's "hearsay evidence is the only evidence establishing the required nexus between [Kardell] as the accused and as the person who committed the offense." Therefore, trial counsel's "failing to object or moving to strike" Officer Rutledge's testimony constituted ineffective assistance of counsel.

In order to prevail on his claims of ineffective assistance of counsel, Kardell must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See Lane*, 726 N.W.2d at 393. We evaluate the totality of the relevant circumstances in a de novo review. *Id*. at 392.

We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Direct appeal is appropriate, however, when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of the ineffective-assistance claim. *Id*.

We can resolve Kardell's claim on this direct appeal because we conclude, as a matter of law, Kardell cannot prove "prejudice resulted." To meet the prejudice prong, Kardell is required to show that, but for counsel's error, there is a reasonable probability that the results of the trial would have been different. *See State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006). "The most important factor under the test for prejudice is the strength of the State's case." *Id*. Because other evidence, properly admitted and described above, overwhelmingly proved defendant Kardell was the person driving the truck, there is no reasonable probability the verdict would have been different if Kardell's counsel had objected to the hearsay evidence at issue. Any alleged failure by counsel did not cause prejudice to Kardell sufficient to establish ineffective assistance of counsel and we affirm his conviction.

AFFIRMED.