IN THE COURT OF APPEALS OF IOWA

No. 3-495 / 12-0041
Filed July 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KIMBERLY SUE VAN CLEAVE,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Timothy T. Jarman, District Associate Judge.

Defendant appeals her conviction, following a non-jury trial on the minutes of evidence, of operating while intoxicated, third offense. **AFFIRMED.**

Priscilla E. Forsyth, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Patrick Jennings, County Attorney, and David C. Skilling, Bobbier A. Cranston, and Rachael Edmundson, Assistant County Attorneys, for appellee.

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

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

MILLER, S.J.

Kimberly Sue Van Cleave appeals her conviction, following a non-jury trial on the minutes of evidence, of operating while intoxicated, third offense. She contends the district court erred in (1) denying a motion to suppress evidence, the results of a Datamaster breath test, (2) finding her guilty of operating while intoxicated. We affirm.

Van Cleave was stopped by a Sioux City police officer after he observed Van Cleave driving the wrong way on a one-way street at about 3:15 a.m. on July 21, 2010. Following an initial investigation, the officer suspected Van Cleave was driving while intoxicated. He administered a preliminary screening test (PBT). The result indicated an alcohol concentration of 0.204. The officer arrested Van Cleave for driving the wrong way on a one-way street and transported her to the Woodbury County jail complex. He subsequently administered a "Datamaster" breath test to Van Cleave. The result indicated an alcohol concentration of 0.172.

The State charged Van Cleave with operating while intoxicated, third offense, in violation of Iowa Code section 321J.2 (2009). Van Cleave pled not guilty and filed a motion to suppress evidence, resisted by the State. Following an evidentiary hearing the district court overruled the motion.[1] Van Cleave waived her right to a jury trial. The parties stipulated to a trial to the court on the trial information and supplemental trial information, the minutes of evidence and

[1] The court sustained the motion in part, but overruled it as to matters relevant to the issues on appeal.

supplements thereto, and attachments to those documents. The court found Van Cleave guilty as charged and imposed sentence. Van Cleave appeals.

Van Cleave raises two claims of district court error. She first asserts: "The district court erred in denying the motion to suppress based on a violation of [Iowa Code section] 321J.6(2)." Her arguments in support of this assertion implicate the interpretation and application of that statute. We review issues of statutory interpretation and application for correction of errors at law. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000).

Van Cleave's second assertion of error is: "The district court erred in finding the defendant guilty of violating Iowa Code section 321J.2." She argues that without the Datamaster test result (the admissibility of which she challenges in her first assertion of error) there was not sufficient evidence to find her guilty of operating while intoxicated. 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).

Van Cleave first asserts the district court erred in not suppressing the Datamaster test result because that test was not *administered* within two hours after the officer administered the PBT. Implicit in this claim of error is a contention that section 321J.6(2) requires the Datamaster test be *administered* within that time limit. As part of this claim of error Van Cleave asserts the officer improperly delayed administration of the Datamaster test. The State asserts error was not preserved on this issue, arguing the claim made in the district court was that the Datamaster test was not *offered* within two hours of the PBT. Van Cleave asserts that if error was not preserved, counsel rendered ineffective assistance. Although we doubt that error has been preserved on this issue, because we find Van Cleave's position to be contrary to both the facts and the law we prefer to address the substance of her claim of error, need not rest our determination on error preservation grounds, and find it unnecessary to address her alternative claim of ineffective assistance of counsel.

At the start of his shift the arresting officer had synchronized his watch with the clock on a video camera in his squad car so that the two were within a minute of each other. They indicated he administered the PBT at 3:40 a.m.

The Datamaster machine has its own clock or timing device. It shows that the 0.172 test result occurred at 5:38 a.m. Other evidence shows that the time on the arresting officer's watch was "behind" the time on the Datamaster by up to but no more than ten minutes. From these facts Van Cleave asserts the PBT was actually given at 3:30 a.m. (Datamaster time) and the Datamaster breath test was thus administered about two hours and nine minutes after the PBT. She

concludes this constitutes a violation of the two-hour limit of section 321J.6(2), and that the trial judge therefore should have suppressed the Datamaster result and erred in not doing so.

For several reasons, some based on the facts and another based on the law, we find Van Cleave's assertions to be without support and without merit.

First, as the officer's watch was "behind" the Datamaster clock, the PBT was administered at about 3:50 a.m. Datamaster time, not 3:30 a.m. Datamaster time. The Datamaster breath test, at 5:38 a.m., was thus administered some ten to twelve minutes before two hours had elapsed after the PBT, not approximately ten to twelve minutes after the two hours had elapsed.

Second, the evidence is clear and undisputed that the officer offered the Datamaster test at about 5:10 a.m. The law requires only the "offer" of the test, not its administration, within the relevant two-hour period. *See* Iowa Code § 321J.6(2); *see also State v. Stoneking*, 379 N.W.2d 352, 355-56 (Iowa 1985) (holding that the predecessor of section 321J.6(2), which used the phrase "fails to provide" instead of the current "fails to offer," was satisfied when the officer offered the test to the defendant within the two-hour period and necessary personnel and equipment were available, even though the test was administered after the two-hour period).

Finally, Van Cleave's contention that the officer unduly delayed administration of the Datamaster test is contrary to the district court's findings, which are fully supported by the evidence. The court found that Van Cleave had initially consented to a Datamaster test, then changed her mind and attempted to

call her attorney and left a message, stated she should be allowed two hours for her attorney to call back, complained about her fiancé (who had locked her out of their motel room) and called and talked to him, then again agreed to take the test but did not initially follow instructions, necessitating a second attempt. In summarizing, the court found that Van Cleave's "behavior was intentionally evasive, misleading, and done for the purpose of delay." The facts thus do not support, and are in fact contrary to, Van Cleave's assertion that the officer was the cause of any delay in the administration of the Datamaster test.

Van Cleave's second assertion of error is that the district court erred in finding her guilty of violating section 321J.2 because without the Datamaster test result there was not sufficient evidence to find her guilty of operating while intoxicated. A person is guilty of operating while intoxicated if the person operates a motor vehicle while either (1) under the influence of an alcoholic beverage, or (2) having an alcohol concentration of 0.08 or more. Iowa Code § 321J.2(1)(a), (b). We have already found no merit to Van Cleave's assertion the Datamaster test result should have been suppressed, and the evidence provided by that result fully supports her conviction under section 321J.2(1)(b). Although not necessary to affirm Van Cleave's conviction, we find the evidence other than the Datamaster result sufficient to support her conviction under section 321J.2(1)(a) as well.

A person is under the influence of an alcoholic beverage when consumption of alcohol results in one or more of the following: (1) the person's mental ability has been affected, (2) the person's judgment is impaired, (3) the

person's emotions are visibly excited, or (4) the person has to any extent lost control of bodily actions or motions. *State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992). The person's manner of driving is relevant. *Id.* Conduct and demeanor are important considerations. *State v. Price*, 692 N.W.2d 1, 3 (Iowa 2005).

As argued by the State, evidence provided by the police report attached to the minutes of evidence supports all four factors listed in *Dominguez*. Van Cleave's inability to remember the last couple of digits of her social security number showed her reason or mental ability had been affected. She demonstrated impaired judgment by driving her vehicle the wrong direction on a one-way street, failing to stop for some time in response to the officer's emergency lights, driving without her driver's license, and giving false information regarding her name. Van Cleave's emotions were visibly excited, as she was very emotional and cried at different times. Evidence that she had to some extent lost control of her bodily actions or motions consisted of her poor performance on a horizontal gaze nystagmus test, a walk-and-turn test, and a one-leg stand test, and her swaying while standing. Her admission she had been drinking, the strong odor of an alcoholic beverage about her, and her watery and bloodshot eyes indicated that her impairment was the result of the consumption of alcohol.

We conclude that even without the Datamaster test result, sufficient evidence supports Van Cleave's conviction under section 321J.2(1)(a).

AFFIRMED.