

IN THE COURT OF APPEALS OF IOWA

No. 7-603 / 06-1791
Filed September 19, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

COREY DEAN NEWBERG,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Robert J. Dull,
District Associate Judge.

Corey Newberg appeals his conviction for operating while intoxicated,
second offense, following a bench trial. **AFFIRMED.**

Jack Faith, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney
General, Darin J. Raymond, County Attorney, and Amy Oetken, Assistant County
Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Corey Newberg appeals his conviction for operating while intoxicated, second offense, following a bench trial. He alleges the district court erred in: (1) finding sufficient evidence to support his conviction and (2) concluding that he refused to consent to chemical testing to determine his blood alcohol content (BAC) and considering such refusal in reaching its verdict. We affirm.

I. Background Facts and Proceedings

On December 25, 2004, at approximately 2:00 a.m., Megan Book was outside her residence smoking a cigarette after staying up late to finish wrapping Christmas presents. She heard a car with its engine “revved up way higher than it should be.” She observed a vehicle traveling at about ninety miles per hour down County Blacktop C-80 in rural Plymouth County. When the vehicle ran over some loose gravel in the roadway it spun out of control, spinning, rolling and landing in a nearby field upside down. After observing this, Book asked her sister to call 911 while she ran to the scene. It took her a moment, but she found Newberg lying on the road bank in pain and bleeding. Book observed that Newberg was not real coherent and smelled of alcohol. Newberg told Book that he was not driving the vehicle, but neither Book nor emergency responders found any evidence of another vehicle occupant.

Deputy Sheriff Aaron Leusink arrived on the scene soon thereafter. Newberg told Leusink the car was being driven by another male individual whom he did not know. During this conversation Leusink noticed a moderate to strong odor of alcohol on Newberg’s breath. Leusink further noticed cans of beer lying on the ground at the scene. One can of beer had been opened. After the

ambulance took Newberg to the hospital, Leusink followed to collect a blood sample to determine Newberg's BAC. At the hospital Newberg again told Leusink that he had not been driving the vehicle but admitted to having a "couple of drinks." Leusink then invoked implied consent, read the advisory, and requested a blood sample. Newberg refused. Leusink did not request a breath or urine sample.

Deputy Sheriff Jim Lubben was also called to the scene of the accident. Lubben determined the car involved in the accident was registered to Laura Newberg, who resided at the same address as the defendant. Lubben saw no signs of any other vehicle occupants, but noticed a bottle of whisky, in addition to several cans of beer, near the vehicle. He also noted a blood trail at the scene. Based on Lubben's specialized training in accident investigation, he determined the driver of the vehicle lost control, in part, due to speed.

Newberg was treated for his injuries by Dr. Thomas Benzoni. Benzoni's testimony was based mostly on his notes and medical records, because he had little independent recall of treating Newberg. However, he testified he would normally obtain a history from the ambulance personnel and then do a history and physical with the patient. A review of his notes indicated he had no great concern that Newberg was intoxicated. He testified that the nature of Newberg's injuries could have easily disorientated him and possibly made him appear intoxicated.

Newberg was later charged with operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (2003). After a mistrial to a jury, Newberg waived his right to a jury trial. The district court found him guilty as

charged following a bench trial. Newberg was sentenced to sixty days in jail with all but seven days suspended and placed on probation for two years. He now appeals.

II. Scope of Review

We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 6.4; *State v. Turner*, 630 N.W.2d 601,610 (Iowa 2001).

III. Sufficiency of Evidence

We review a verdict rendered in a criminal case tried to the court for sufficiency of evidence. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). “[W]e view the evidence in the light most favorable to the [S]tate, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record.” *State v. Mills*, 458 N.W.2d 395, 397 (Iowa Ct. App. 1990) (quoting *State v. Wheeler*, 403 N.W.2d 58, 60 (Iowa Ct. App. 1987)). Direct and circumstantial evidence are equally probative, but it must create more than a mere “speculation, suspicion, or conjecture” of guilt. *Id.* We look for evidence that could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Taft*, 506 N.W.2d at 762. The district court’s determinations of law do not bind us. *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).

To prove Newberg guilty of operating while intoxicated the State was required to prove that he (1) operated a vehicle and (2) did so while under the influence of alcohol or drugs. Iowa Code § 321J.2(1). Newberg claims there was insufficient evidence to prove he was under the influence. A person is “under the influence” or “intoxicated” when one or more of the following is found:

(1) the person's reasoning or 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. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 355 (Iowa 1995); *In re S.C.S.*, 454 N.W.2d 810, 814 (Iowa 1990).

Reviewing the record in the light most favorable to the State, we find there is substantial evidence for a reasonable trier of fact to find Newberg was under the influence of alcohol. At trial, there was evidence that the vehicle spun out of control due to speed; there were cans of beer and a bottle of whiskey at the scene of the accident; a lay witness and deputy sheriff smelled alcohol on Newberg's breath; Newberg admitted to having some drinks earlier that night; he fabricated a story that another person was driving the car; and both witnesses mentioned above testified at trial to their opinions Newberg was under the influence of alcohol. There is sufficient evidence for a rational trier of fact to conclude that Newberg was under the influence.

IV. Refusal to Consent

Newberg next argues the trial court erred when it found that he refused to consent to chemical testing of his blood to determine his BAC and improperly considered the refusal in making its decision. The State argues Newberg failed to preserve this issue for appeal because he failed to file a motion to suppress evidence of the refusal and failed to object to the evidence at trial. We agree with the State.

Newberg claims the statute requires his declination of a blood test not be considered as evidence of guilt. Newberg was made aware of this evidence prior

to trial by the minutes of Deputy Leusink in the trial information. He neither filed a motion to suppress nor objected to the admission of the evidence at trial. To preserve error, “issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.” *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995). Because Newberg failed to file a motion to suppress or object at trial, he provided the district court with no opportunity to decide whether the evidence should or should not be considered under Iowa Code section 321J.6(2). The issue was therefore not preserved.

AFFIRMED.