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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1311

Filed: 7 August 2018

Swain County, No. 15-CRS-050416

STATE OF NORTH CAROLINA

v.

JOHNNY BECKER, JR., Defendant.

Appeal by defendant from judgment entered 15 February 2017 by Judge William H. Coward in Swain County Superior Court. Heard in the Court of Appeals 6 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Rory P. Agan, for the State.

Winifred H. Dillon for defendant-appellant.

BERGER, Judge.

A Swain County jury convicted Johnny Becker, Jr. ("Defendant") of driving while impaired ("DWI"). Defendant appeals, arguing the trial court erred in denying his motion to dismiss because the State's evidence was insufficient to establish impairment at the time he was driving. Because we conclude the State presented sufficient evidence to allow a reasonable inference as to Defendant's guilt, we find no

error.

Factual and Procedural Background

The State's evidence tended to show on July 19, 2015, Trooper Brian Parker with the North Carolina Highway Patrol received a dispatch call regarding an accident involving a four-wheeler. When Trooper Parker arrived at Defendant's home at 10:16 p.m., local fire department personnel and other first responders were on the scene administering emergency care to Defendant's passenger. Defendant was sitting on his front porch.

When asked about the accident, Defendant informed Trooper Parker that he had been going about five miles-per-hour in his four-wheeler and made a sharp turn. At that time, the passenger leaned outside the vehicle causing the four-wheeler to roll over. Defendant told Trooper Parker that the accident had occurred a short distance away at Swain Memorial Park.

During his conversation with Defendant, Trooper Parker noticed a strong odor of alcohol on Defendant's person and breath, that his speech was slurred, and that his eyes were red and bloodshot. Trooper Parker also observed Defendant lose his balance when he stood up out of the chair.

Defendant agreed to accompany Trooper Parker to Swain Memorial Park to show him the exact location of the accident. Upon arriving at the park, Trooper Parker observed tire tracks in the grass and "yaw marks where the [four-wheeler]

had slid and then rolled." Defendant subsequently admitted that he had consumed alcohol two hours earlier.

Based on his observations of Defendant, Trooper Parker formed the opinion that Defendant "had consumed a sufficient amount of an impairing substance to appreciably impair his mental and physical faculties" and placed him under arrest for driving while impaired. During transport to the police station, Defendant informed Trooper Parker that he drove the four-wheeler back to his residence after the accident. Trooper Parker concluded that a vehicle could not travel from the scene of the accident to Defendant's home without crossing a public highway.

At the police station, Trooper Parker noted that Defendant still had a strong odor of alcohol on his breath, slurred speech, and red, bloodshot eyes. Trooper Parker administered intoximeter tests at 10:56 p.m. and 10:59 p.m., both of which measured Defendant's blood alcohol level as 0.09, above the legal limit. *See* N.C. Gen. Stat. § 20-138.1(a)(2) (2017) (specifying the legal limit as 0.08). Trooper Parker charged Defendant with driving while impaired.

Defendant was found guilty of driving while impaired in Swain County District Court on February 1, 2016, and subsequently appealed to superior court. Defendant's was tried in Swain County Superior Court on February 14, 2017. At the close of the State's evidence, Defendant moved to dismiss the charge arguing the State's evidence was insufficient to show he was impaired at the time he was driving the four-wheeler.

The trial court denied the motion. Defendant did not present any evidence and renewed his motion to dismiss, which the trial court denied.

The jury found Defendant guilty of driving while impaired, and Defendant was sentenced as a Level II offender. The trial court imposed a seven-day split sentence and placed Defendant on supervised probation for a period of twenty-four months. Defendant timely appealed.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss. Specifically, he contends that the State presented insufficient evidence to show that he was impaired at the time he was driving the four-wheeler. We disagree.

Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch,* 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied,* 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265

S.E.2d 164, 169 (1980). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone,* 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas,* 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (*purgandum*[1]). "In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence . . . ." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982) (citation omitted).

Pursuant to N.C. Gen. Stat. § 20-138.1, a person commits the offense of driving while impaired "if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) [w]hile under the influence of an impairing substance; or (2) [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen.

[1] Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

Stat. § 20-138.1(a)(1)-(2) (2017). A "relevant time after the driving" is defined as "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving." N.C. Gen. Stat. § 20-4.01(33a) (2017). "Thus, there are two ways to prove the single offense of impaired driving: (1) showing appreciable impairment; or (2) showing an alcohol concentration of 0.08 or more." *State v. Narron*, 193 N.C. App. 76, 79, 666 S.E.2d 860, 863 (2008) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 135, 674 S.E.2d 140, *and cert. denied*, 558 U.S. 818, 175 L. Ed. 2d 26 (2009).

Defendant cites this Court's recent decision in *State v. Eldred*, ___ N.C. App. ___, ___ S.E.2d ___, No. COA17-795, 2018 WL 2012103 (2018), to support his contention that the State presented insufficient evidence he was impaired at the time he was driving the four-wheeler. However, *Eldred* is distinguishable.

In *Eldred*, the defendant was found guilty of DWI based on allegedly driving his vehicle while impaired by methamphetamine. *Id*. at *1. An officer responding to the scene of a reported motor vehicle accident, found a crashed vehicle abandoned on the side of the road with one-hundred feet of tire impressions on the grass leading from the highway to the vehicle. *Id*. The officer, looking for the driver of the vehicle later found the defendant walking along the road about two to three miles away from the vehicle. *Id*. The officer observed that the defendant was twitching, had a head injury, and was unsteady on his feet. *Id*. When the officer asked why the defendant

was walking down the road, the defendant replied, "I don't know, I'm too smoked up on meth." *Id*. After the defendant told the officer he was in pain, the officer called for medical assistance, and the defendant was taken to the hospital. *Id*. At the hospital, a second officer interviewed the defendant, who first claimed that he had been driving and ran out of gas. *Id.* at *2. The defendant later admitted, however, that "he was hurt bad and was involved in a wreck a couple hours ago." *Id*. Defendant denied drinking alcohol but again admitted "he was on meth." *Id.*

On appeal, the defendant in *Eldred* argued the State failed to present substantial evidence that he was impaired *while* he was driving his vehicle. *Id*. A panel of this Court agreed, holding that the State did not present any evidence, direct or circumstantial, that the defendant was impaired by methamphetamine at the time he was driving the vehicle. *Id*. at *4. This Court explained that the State failed to present any evidence of (1) when the accident occurred, (2) when the first officer encountered the defendant walking along the road, (3) whether the defendant's impaired condition was caused by an impairing substance or the accident that required he be taken to the hospital, or (4) when or where the defendant consumed methamphetamine. *See id*. at *3. Accordingly, a panel of this Court held the State failed to present substantial evidence that the defendant was impaired by methamphetamine at the time he was driving, and reversed the defendant's conviction for driving while impaired. *Id*. at *4.

The current matter is distinguishable from *Eldred* in three notable respects. First, in *Eldred*, the State's evidence failed to provide any indication as to when the defendant consumed an impairing substance in relation to his driving. Although the State, in the case *sub judice*, similarly did not present evidence establishing the exact time the accident occurred, Trooper Parker's testimony permitted a reasonable inference that the accident was a recent occurrence and that Defendant consumed the alcohol prior to his driving. Trooper Parker testified that when he arrived at Defendant's home 45 minutes after receiving the dispatch call, first responders and emergency personnel were still providing emergency care to the passenger of the four-wheeler, who eventually had to be airlifted to a hospital due to the extent of her injuries. The State's evidence tended to show that the location of the accident was just a few minutes away from Defendant's home, and that Defendant admitted to driving the four-wheeler home after the accident. Further, Trooper Parker testified that Defendant admitted he last drank alcohol two hours earlier, and that when he arrived at Defendant's home, Defendant had a strong odor of alcohol on his person and breath, slurred speech, and red, bloodshot eyes. Based on his observations and Defendant's statements, Trooper Parker determined Defendant "did not recently . . . consume [the alcohol]." Thus, unlike *Eldred*, a jury could reasonable infer from the State's evidence that Defendant consumed alcohol prior to driving.

Second, in *Eldred*, the State's evidence failed to differentiate between the

impairing substance and the injury sustained in the accident as the cause of the defendant's condition. In contrast, there was no evidence here that Defendant sustained any injuries when he crashed the four-wheeler. Therefore, there was no indication that his impaired condition could have derived from anything other than the alcohol Defendant consumed before the accident.

Finally, the impairing substance at issue in *Eldred* was methamphetamine. Therefore, the State was limited to proving impairment under N.C. Gen. Stat. § 20-138.1(a)(1), which requires a showing that the defendant was driving "any vehicle upon any highway, any street, or any public vehicular area within the State [w]hile under the influence of an impairing substance." The State in *Eldred* failed to satisfy this requirement, however, as the State did not present any evidence to demonstrate when the defendant consumed the methamphetamine to establish he was impaired while driving. Here, the impairing substance at issue was alcohol. Therefore, the State could establish that Defendant was guilty of DWI by showing that Defendant was either driving while under the influence of an impairing substance, pursuant to Section 20-138.1(a)(1), or by establishing that Defendant "at any relevant time after the driving, [had] an alcohol concentration of 0.08 or more" per Section 20-138.1(a)(2). Accordingly, the State presented evidence that shortly after 10:16 p.m., Defendant admitted to having consumed alcohol "two hours earlier," and his blood alcohol concentration at 10:56 p.m. was found to be 0.09, above the legal limit. Thus, unlike

Eldred, the State presented substantial evidence by which a jury could convict Defendant of DWI under N.C. Gen. Stat. § 20-138.1.

Viewing this evidence in the light most favorable to the State and giving the State all reasonable inferences that can be drawn therefrom, the State presented substantial evidence from which a reasonable juror could conclude Defendant had consumed alcohol prior to the accident and that he was impaired at a relevant time after driving.

Conclusion

The trial court did not err in denying Defendant's motion to dismiss. Defendant received a fair trial free from error.

NO ERROR.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).