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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1204

Filed: 7 May 2019

Randolph County, No. 16CRS053077

STATE OF NORTH CAROLINA

v.

JOSEPH EDWARD NEESE, Defendant.

Appeal by defendant from judgment entered 24 May 2018 by Judge V. Bradford Long in the Superior Court of Randolph County. Heard in the Court of Appeals 9 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General, Kindelle McCullen, for the State.

The Law Offices of J. Scott Smith, PLLC, by J. Scott Smith and J. Patrick Ellington, for defendant-appellant.

BERGER, Judge.

On May 24, 2018, a Randolph County jury convicted Joseph Edward Neese ("Defendant") of driving while impaired. On appeal, Defendant contends that the State failed to identify Defendant as the perpetrator of the offense and that the trial

court therefore erred when it denied his motion to dismiss at the close of all evidence. We disagree.

Factual and Procedural Background

The State's evidence tended to show that at approximately 9:00 p.m. on July 5, 2015, Randleman Police Officer Justin Boozer ("Officer Boozer"), responded to a call from a concerned store employee. The employee reported a suspicious white male sitting in a white vehicle in the parking lot of the shopping center where his store was located. The white male had entered the store, inquired as to the closing time, and then returned to his vehicle. The employee was afraid that the white male might be planning to rob the store.

Upon arriving at the scene, Officer Boozer made contact with the employee and learned that the white vehicle had left the area. Officer Boozer then noticed a white vehicle "in the same parking lot" that was "driving down the middle of the road toward the end of the parking lot in a slow manner," and the brake light was "coming on and going off." The employee indicated that this was the vehicle she had called about. After observing the vehicle for five to ten more seconds, Officer Boozer conducted a traffic stop.

Officer Boozer approached the vehicle and made contact with Defendant, whose eyes appeared bloodshot and who seemed hesitant to answer questions. Defendant was the only person inside the vehicle. Officer Boozer requested

Defendant's driver's license, returned to his vehicle, and conducted a background check. When he returned to Defendant's vehicle, Officer Boozer observed what appeared to be a liquor bottle and asked Defendant if he could see it. Defendant handed Officer Boozer an open, three-fourths empty bottle of Fireball Whiskey. Defendant denied consuming any alcohol. Officer Boozer then asked Defendant to exit the vehicle and pour the whiskey out of the bottle. Defendant complied. Officer Boozer observed that Defendant was "unsteady on his feet," "swaying back and forth," and smelled of alcohol.

With Defendant's consent, Officer Boozer administered four different field sobriety tests: a preliminary breath test (two administrations), the walk-and-turn test, the finger-to-nose test, and the one-legged stand. Both breath tests were positive for the presence of alcohol—after the first, Defendant admitted to consuming "two shots of whiskey." During the walk-and-turn test, Defendant was unsteady on his feet, was unable to follow the imaginary line, and failed to place feet heel-to-toe as instructed. On the finger-to-nose test, Defendant was unable to touch the tip of his nose as instructed, but touched the bridge of his nose and his upper lip several times. During the one-legged stand, Defendant was unable to hold one foot up for more than a few seconds at a time. Following the field sobriety tests, Officer Boozer concluded that Defendant was intoxicated, arrested him on the charge of driving while impaired, and transported him to the Randleman Police Department.

At the police department, Defendant submitted to an Intoximeter breath test. The initial breath sample had a positive result, and Defendant refused a second application of the test. Officer Boozer next read Defendant his *Miranda* rights, and later asked whether Defendant would be willing to go to the Randolph County Jail to provide a blood sample. Defendant declined. Officer Boozer then obtained a search warrant for blood. Defendant's blood was drawn and tested pursuant to the search warrant. The test indicated that Defendant had a blood alcohol concentration of .07 grams per 100 milliliters of blood.

Defendant entered a plea of guilty in District Court on October 3, 2017 and then appealed to Superior Court the following day. On May 24, 2018, a jury found Defendant guilty of driving while impaired. Defendant was sentenced as a Level II offender to a ten day split sentence and supervised probation. Defendant timely appealed.

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). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* "If so, the motion is properly denied." *State v. Scott,* 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial

evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (1980). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *Scott,* 356 N.C. at 595, 573 S.E.2d at 868. "In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Parker,* 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001).

Analysis

"The essential elements of DWI are: (1) *Defendant* was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark,* 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002) (emphasis added).

In this case, Defendant does not contend that the State's evidence was insufficient to prove that the crime of driving while impaired was committed. Defendant asserts only that the State failed to offer sufficient evidence to prove that Defendant was the perpetrator of the offense. In support of this claim, Defendant

argues that "to (rarely) say the name of the person seated at the defense table, and to (also rarely) say 'the Defendant' is not the same as to say 'the person seated there today is the person whom I saw commit the crime.' "

The law does not prescribe the specific language that the State must use to establish that the Defendant is the party who committed the charged offense. Nor does the law require that the State present direct evidence in the form of an in-court identification to establish that Defendant committed the offense, as Defendant suggests. *See State v. Prigden,* 313 N.C. 80, 85-95, 326 S.E.2d 618, 622-628 (1985) (finding "substantial evidence that defendant was the perpetrator of the crime" where there was no in-court identification). Rather, it is enough that the State presented evidence upon which a reasonable jury might infer the Defendant's identity as the perpetrator of the offense. *See Cummings*, 46 N.C. App. at 683, 265 S.E.2d at 925 ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

The State presented substantial evidence that Defendant had driven a vehicle upon a public vehicular area while under the influence of alcohol. Officer Boozer testified that upon arriving on the scene, he observed a white vehicle "driving down the middle of the road toward the end of the [shopping center] parking lot . . ." and that he had gone "up and made contact with *the driver* . . . ." (emphasis added). Officer Boozer asked the driver for his driver's license, returned to his patrol car to run the

license, and then "went back up and made contact with *Mr. Neese* . . . ." (emphasis added). Later, when asked by the State whether "there was anybody else in the car besides *the Defendant* when [he] stopped him," Officer Boozer responded, "[n]o, he was by hisself (*sic*)." (emphasis added). Similarly, when defense counsel cross examined Officer Boozer about certain physical attributes that might hinder a person's ability to perform the various field sobriety tests he had performed on Defendant during the same encounter, defense counsel asked "[s]o *my client* is more than 50 pounds overweight. You would agree with that?" (emphasis added).

Throughout his testimony, Officer Boozer referred to the driver and sole occupant of the white vehicle interchangeably as "Mr. Neese" and "the driver." He further responded to questions by the State and defense counsel who referred to the driver of the vehicle as "the Defendant" or "my client." While Defendant is correct that Officer Boozer did not testify that "the person seated [at the defendant's table] is the person whom [he] saw commit the crime," the law requires no such testimony. On the evidence presented, a reasonable jury could conclude that Defendant was the driver of the vehicle stopped by Officer Boozer, thus the trial court did not err when it denied Defendant's motion to dismiss.

NO ERROR.

Chief Judge MCGEE and Judge TYSON concur.

Report per Rule 30(e).