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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 20-290

Filed: 31 December 2020

Randolph County, No. 17 CRS 50560

STATE OF NORTH CAROLINA

v.

DANIEL CHRISTIAN GARNER, Defendant.

Appeal by defendant from judgment entered 30 July 2019 by Judge Thomas H. Lock in Randolph County Superior Court. Heard in the Court of Appeals 21 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State.

Blass Law, PLLC, by Danielle Blass, for defendant-appellant.

YOUNG, Judge.

This appeal arises out of a conviction for driving while impaired. After careful review, we hold that the trial court did not err in denying Defendant's motion to dismiss the charge of driving while impaired for insufficiency of the evidence, nor did the trial court err in admitting Officer Garner's testimony that Defendant "was probably intoxicated."

I. Factual and Procedural History

On 9 February 2017, a manager at a Little Caesars in Asheboro, North Carolina, observed Daniel Christian Garner (“Defendant”) enter the store. While Defendant was in the store he was mumbling, stumbling, and walking in circles. After Defendant exited the store, customers reported that Defendant was in the parking lot, in a running vehicle, with the windows down and slumped over. Donna Cole (“Cole”), a Little Caesars customer, observed Defendant slumped over the steering wheel, and notified the store manager. Cole was a first responder for twenty-five years and was concerned that Defendant may need medical attention.

The store manager shook Defendant until he woke up. Defendant’s foot came off the brake, causing the vehicle to roll backwards. The manager yelled, Defendant hit the brake, and swerved back into a parking space on the opposite side of the parking lot. Cole called 911 to report the accident, and Defendant drove off. Cole also left the parking lot.

From Little Caesars, Cole traveled to a nearby Sheetz to get gas. Again, she observed Defendant at the next gas pump slumped over the steering wheel, unconscious. Cole called 911. Officers Alan Henson (“Officer Henson”) and Linda Garner (“Officer Garner”) arrived at the scene, and Officer Garner shook Defendant to wake him.

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Officer Garner noticed that Defendant's pupils were tiny, and his eyes were glassy. Defendant admitted to taking a Valium or a Xanax. He was too unsteady on his feet for officers to safely administer standardized field sobriety tests. Officer Garner obtained a search warrant to take a sample of Defendant's blood. Danielle Marie O'Connell, a Forensic Scientist II in the Toxicology Section of the North Carolina State Crime Laboratory, performed a chemical analysis of Defendant's blood sample and determined it was positive for Xanax, amphetamine, and methamphetamine.

Defendant was charged with driving while impaired, pleaded not guilty, and his case proceeded to trial before a jury, which convicted him. The trial court sentenced Defendant to a term of imprisonment for sixty days, giving Defendant credit for sixty days of pre-trial confinement. Defendant filed written notice of appeal.

II. Motion to Dismiss

"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). "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. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451,

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455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *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). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

A person commits the offense of driving while impaired if the State proves, beyond a reasonable doubt, that “(1) [d]efendant 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) *aff’d* 357 N.C. 242, 580 S.E.2d 693 (2003); N.C. Gen. Stat. § 20-138.1 (2020). A person is considered to be under the influence of an impairing substance when his “physical or mental faculties, or both, are appreciably impaired by an impairing substance.” N.C. Gen. Stat. § 20-4.01 (48b) (2020). In order to show impairment, “the State need not show that the defendant is ‘drunk,’ i.e., that his or her faculties were *materially* impaired. . .[t]he effect must be appreciable, that is,

sufficient to be recognized and estimated, for a proper finding that defendant was impaired.” *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985).

Defendant contends that the trial court erred in denying his motion to dismiss the charge of driving while impaired for insufficiency of the evidence. However, the State presented overwhelming evidence that Defendant was significantly impaired on 9 February 2017.

Defendant admitted to taking Valium or Xanax on 9 February 2017, and his blood test confirmed the presence of Xanax, methamphetamine and amphetamine. O’Connell explained the background and effects of each drug, including the effects of Xanax such as drowsiness and confusion, and the withdrawal symptoms of methamphetamine, including fatigue and drowsiness.

The State’s evidence showed that on 9 February 2017, a manager observed Defendant stumbling, walking in circles, and mumbling to himself inside Little Caesars. Cole later found Defendant slumped over the steering wheel of his running car in Little Caesars’ parking lot. The manager shook Defendant “pretty hard” to wake him up, and upon waking, Defendant’s foot came off the brake of the vehicle, causing it to roll backwards until Defendant regained control.

Within minutes of leaving Little Caesars parking lot, Cole found Defendant slumped over the steering wheel of his running vehicle at a Sheetz gas station. Defendant did not initially respond to Officer Garner’s loud voice, and again had to

be shaken to wake up. Upon waking, Defendant had glassy eyes and very tiny pupils, and he was unsteady on his feet.

The State presented substantial evidence that Defendant was driving a vehicle on a highway, street, or other vehicular area, while under the influence of an impairing substance. Therefore, the trial court did not err in denying Defendant's motion to dismiss.

III. Lay Witness Testimony

a. Standard of Review

Plain error arises when the error is “so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). “Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

b. Analysis

Defendant contends that the trial court erred by allowing Officer Garner to testify as to her opinion that Defendant was impaired and allowing Cole to testify as to her observation that Defendant “was probably intoxicated.” We disagree.

Defendant acknowledges that he did not object to the admission of either opinion at trial, thus, this argument is reviewed for plain error.

If a witness is not testifying as an expert, “his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1 Rule 701 (2020).

i. Officer Garner’s Testimony

Officer Garner formed an opinion that Defendant was impaired based upon her personal observations of Defendant, including his unsteadiness on his feet, glassy eyes, and small pupils. Officer Garner’s opinion was relevant to the issue of whether Defendant operated a vehicle while impaired. *See State v. Lindley*, 286 N.C. 255, 257, 210 S.E.2d 207, 209 (1974). Defendant contends that Officer Garner’s lay opinion testimony should not have been admitted because she failed to interrogate Defendant. However, such an interrogation, or lack thereof, has no bearing on the admissibility of the testimony, and goes only to the weight of the evidence. *See State v. Strickland*, 321 N.C. 31, 37, 361 S.E.2d 882, 885 (1987). Defendant has failed to prove that absent Officer Garner’s testimony the jury would have reached a different result. Accordingly, the trial court did not commit plain error in allowing Officer Garner to testify as to her opinion that Defendant was impaired.

ii. Cole's Testimony

Cole formed the opinion that Defendant “was probably intoxicated” based upon her personal observations of Defendant on 9 February 2017. Cole observed Defendant unsteady on his feet while he stood with the police officers at Sheetz. This testimony goes to the relevant issue of whether Defendant was impaired on that date. The trial court did not commit plain error in allowing Cole to testify that Defendant “was probably intoxicated.”

iii. Prejudice

Assuming *arguendo* that the trial court erred in allowing Officer Garner and Cole to testify as to their opinions regarding Defendant's impairment, Defendant has failed to show that absent their testimonies the jury would have probably reached a different result. There was overwhelming evidence of Defendant's guilt, and Defendant cannot demonstrate that a fundamental error occurred. Therefore, the trial court did not commit plain error in allowing Officer Garner or Cole to testify.

NO ERROR AND NO PLAIN ERROR.

Judges DILLON and INMAN concur.

Report per Rule 30(e).