IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-166

No. COA20-510

Filed 20 April 2021

Onslow County, No. 18 CRS 53432

STATE OF NORTH CAROLINA

v.

ELIZABETH ANN HERNANDEZ

Appeal by defendant from judgment entered 10 March 2020 by Judge Joshua W. Willey Jr. in Onslow County Superior Court. Heard in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Katherine M. McCraw, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for the defendant.

ARROWOOD, Judge.

¶ 1 Elizabeth Ann Hernandez ("defendant") appeals from her conviction for impaired driving. Defendant argues that the trial court erred in denying a motion to dismiss for insufficient evidence and in instructing the jury that it could infer guilt from defendant's refusal to submit to a blood test. For the following reasons, we find

no error in defendant's trial.

I. Background

¶ 2 On 20 June 2018, defendant was charged with impaired driving and failure to maintain lane control. Defendant was convicted of impaired driving in Onslow County Superior Court on 20 November 2019 and gave notice of appeal on 27 November 2019. The matter came on for trial on 9 March 2020 in Onslow County District Court, the Honorable Joshua W. Willey Jr., presiding. The State's evidence tended to show as follows.

¶ 3 On 20 June 2018, Onslow County Sheriff's Office Sergeant Thomas Marshburn ("Sergeant Marshburn") was on patrol and received a call in reference to a vehicle driving erratically on Highway 17 South near Wilmington. After responding to the call, Sergeant Marshburn observed a red Nissan Frontier pickup truck traveling south on Highway 17 and being followed by an ambulance. Sergeant Marshburn observed the pickup truck cross the yellow fog line on the furthest left side of the highway, then almost entirely into the grassy median dividing the north and southbound lanes, with additional swerving before Sergeant Marshburn activated his lights to initiate a traffic stop. The ambulance also stopped at the scene. Sergeant Marshburn approached the vehicle and spoke with defendant, who said she was on her way to get dog food and was "having trouble with her eyes because she had just bombed her house for bed bugs." Defendant additionally stated that she thought she

had been poisoned by the bed bug treatment but declined to speak with the EMS workers that had stopped at the scene.

¶ 4 Sergeant Marshburn observed that defendant's voice was "low and raspy and slurred[,]" and defendant had difficulty opening her eyes and "very slow movements." Sergeant Marshburn asked if defendant had taken any medications, to which defendant responded that she had not. Defendant also stated that she had not been drinking, and Sergeant Marshburn did not smell any alcohol on defendant's breath or person.

¶ 5 Sergeant Marshburn next administered several standard field sobriety tests. Sergeant Marshburn observed that defendant braced herself against the vehicle to walk and swayed while standing in place. Sergeant Marshburn first administered the horizontal gaze and nystagmus test, noting that although defendant had difficulty holding her eyes open throughout the test, Sergeant Marshburn did not observe any clues on the test and both of defendant's pupils were of equal size. On the walk-and-turn test, Sergeant Marshburn observed that defendant had difficulty taking the starting position; defendant stated that she had problems with her left knee and needed a hip replacement. After defendant nearly fell over while attempting to begin the test, Sergeant Marshburn decided that it was not safe to proceed with the walk-and-turn test. On the one-leg-stand test, Sergeant Marshburn observed defendant use her arms for balance, sway and hop in place, and put her foot down within ten

seconds. Sergeant Marshburn observed four out of four possible clues of impairment on the one-leg-stand test. Sergeant Marshburn again asked if defendant had been taking any medications. Defendant responded that she was prescribed multiple medications and had taken oxycodone the previous night but that it was not affecting her, in addition to stating that she was disabled and that her doctor had told her that she had a stroke. Sergeant Marshburn testified that in his opinion, defendant had "consumed a sufficient amount of impairing substance to appreciably impair her mental and physical faculties."

¶ 6 Sergeant Marshburn placed defendant under arrest and transported her to jail. Upon arriving at the jail, Sergeant Marshburn requested that defendant submit to a drug recognition expert evaluation and blood draw, but defendant refused to consent to either. Sergeant Marshburn applied for a search warrant for the blood sample and obtained defendant's consent to the blood draw after the warrant was granted.

¶ 7 The State also presented testimony from Kathleen Barra ("Barra"), employed by the North Carolina State Crime Laboratory as a forensic scientist. Barra testified that she prepared a laboratory report for the blood sample analysis in this case. Barra testified that her analysis of defendant's blood confirmed the presence of hydrocodone, diazepam, nordiazepam, dihydrocodeine, and zolpidem. Barra described the effects of benzodiazepines and opiates, which both act as central

nervous system depressants. Barra stated that diazepam and nordiazepam, types of benzodiazepines, can cause drowsiness, confusion, and slow reflexes, while hydrocodone and dihydrocodeine, both types of opiates, would have similar effects.

¶ 8 At the close of the State's evidence, defendant made a motion to dismiss arguing that the evidence did not show impairment. The trial court denied defendant's motion. Defendant renewed the motion at the close of all evidence, and the trial court denied the renewed motion.

¶ 9 During the charge to the jury, the trial court gave the following instruction:

> If the evidence tends to show that a blood test was offered to the defendant by a law enforcement officer and that the defendant refused to take the test, you may consider this evidence, together with all other evidence, in determining whether the defendant was under the influence of an impairing substance at the time the defendant allegedly drove a motor vehicle.

¶ 10 On 10 March 2020, the jury found defendant guilty of impaired driving and responsible for failure to maintain lane control. The trial court sentenced defendant to a suspended sentence of 60 days in jail and supervised probation for 18 months.

¶ 11 On 12 March 2020, defendant returned to the court without representation to enter oral notice of appeal. The trial court and defendant had the following exchange:

> COURT: Okay. All right. In Ms. Hernandez's case, note her notice of appeal. I'm not going to require any appeal bond. I'm going to appoint the Appellate Defender to represent her in this case.

> . . . .
>
> DEFENDANT: They told me I had to write it out, something stating I'm wanting to appeal it.
>
> COURT: Well, by doing it on the record in here, I don't need that. We've got it, okay?

Defendant did not file written notice of appeal.

II. Discussion

¶ 12 Defendant contends that the trial court erred in denying her motion to dismiss for insufficient evidence and in instructing the jury. Defendant also petitions for *writ of certiorari* to allow appellate review where the right to appeal has been lost by failure to timely give notice of appeal.

A. Appellate Jurisdiction

¶ 13 Any party entitled by law to appeal from a judgment or order of a trial court rendered in a criminal action must take appeal by either (1) giving oral notice of appeal at trial, or (2) filing written notice of appeal with the clerk of superior court and serving copies of that notice on all adverse parties within fourteen days. N.C.R. App. P. 4(a). This Court is permitted, in its discretion, to issue *writ of certiorari* "in appropriate circumstances . . . to permit review of the judgments and order of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1). This Court has previously granted petitions for *writ of certiorari* where, as here, "[d]efendant lost her right to appeal through no fault

of her own but rather due to her trial counsel's failure to give proper notice of appeal." *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 232 (2015). In such circumstances, the defendant's appeal is dismissed and this Court issues *writ of certiorari* to address the merits of the defendant's argument. *Id.* (citing *In re I.T.P-L*, 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008)).

¶ 14 In this case, defendant's notice of appeal was ineffective because it was not given at trial nor written and filed. Accordingly, we dismiss the appeal, but in the exercise of our discretion grant defendant's petition for *writ of certiorari* and address the merits of defendant's contentions.

B. Motion to Dismiss for Insufficient Evidence

¶ 15 Defendant argues that the trial court erred in denying her motion to dismiss for insufficient evidence. We disagree.

¶ 16 In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted). Substantial evidence is defined by the North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee,* 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick,* 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). When ruling on a motion to dismiss, the only question for the trial court

is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citation omitted).

¶ 17 N.C. Gen. Stat. § 20-138.1 provides that a person commits the offense of impaired driving by driving "any vehicle upon any highway, any street, or any public vehicular area within this state . . . [w]hile under the influence of an impairing substance . . . ." N.C. Gen. Stat. § 20-138.1 (2019). An impairing substance may include "alcohol, [a] controlled substance under Chapter 90 of the General Statutes, [or] any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." N.C. Gen. Stat. § 20-4.01(14a) (2019). The State is required to prove that the defendant has "taken a sufficient amount of narcotic drugs, to cause [them] to lose the normal control of [their] bodily or mental facilities, or both, to such an extent that there is an appreciable impairment of either or both of these faculties." *State v. Norton*, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011) (quotation marks and citation omitted). A showing that a motorist has consumed impairing substances, either by direct

evidence of ingestion or presence of metabolites in the defendant's blood, considered in connection with faulty driving or other conduct indicating impairment, is sufficient for a *prima facie* violation of N.C. Gen. Stat. § 20-138.1. *State v. Shelton*, 263 N.C. App. 681, 688-89, 824 S.E.2d 136, 141-42, *disc. review denied*, 372 N.C. 292, 826 S.E.2d 705 (2019).

¶ 18 In this case, the State presented evidence that defendant had consumed a sufficient amount of impairing substances in addition to evidence of faulty driving and other conduct indicating impairment. The blood sample analysis showed the presence of five prescription medications in defendant's system, which Barra testified were benzodiazepines and opiates that had the potential to be impairing. Sergeant Marshburn also testified that defendant was driving erratically before being pulled over, had difficulty speaking clearly and keeping her eyes open, and was unable to walk without bracing herself against her vehicle. The testimony and blood sample analysis are sufficient for a reasonable mind to accept as adequate to support the conclusion that defendant was driving while impaired. Accordingly, viewing the evidence in the light most favorable to the State, we hold that there was substantial evidence that defendant was driving while impaired and the trial court did not err in denying the motion to dismiss.

C. Jury Instructions

¶ 19 Defendant next contends that the trial court erred in its jury instructions on

defendant's refusal to submit to a blood test. We disagree.

¶ 20 The trial court is required to instruct the jury on "the law arising on the evidence." *State v. James*, 184 N.C. App. 149, 151, 646 S.E.2d 376, 377 (citing *State v. Bogle,* 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989)), *writ denied, disc. review denied*, 361 N.C. 572, 651 S.E.2d 368 (2007). The main purpose of a jury charge is "to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 28-29 (2010) (citing *State v. Williams,* 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971)). "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *Id.* at 694, 690 S.E.2d at 29 (citation omitted).

¶ 21 A defendant is required to show that a challenged jury instruction is both erroneous and that such error prejudiced the defendant. *Id.* (citing N.C. Gen. Stat. § 15A-1442(4)(d)). "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2019). The burden of showing such prejudice is on the defendant. *Id.* This Court has held that where there was sufficient evidence for a jury to find that the defendant was appreciably impaired, instructing the jury on refusal as evidence of the defendant's guilt did not constitute prejudicial error. *See State v. Davis*, 142 N.C.

App. 81, 89, 542 S.E.2d 236, 240 (2001) (holding no prejudicial error where defendant smelled of alcohol, failed three field sobriety tests, slurred his words, and chemical analysis revealed presence of alcohol and other impairing substances).

¶ 22 With respect to the admissibility of refusing to submit to a chemical analysis, N.C. Gen. Stat. § 20-139.1(f) provides that "[i]f any person charged with an implied-consent offense refuses to submit to a chemical analysis or to perform field sobriety tests at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action against the person." N.C. Gen. Stat. § 20-139.1(f) (2019).

¶ 23 In this case, the record reveals that defendant originally refused the test as indicated on the officer's affidavit in support of his application for a search warrant. Following a search warrant being issued by the Magistrate requiring the defendant's blood be drawn, defendant ultimately submitted to the blood draw. The fact of her refusal was admissible as permitted by statute, and as the trial court instructed, her initial refusal could be considered together with all other evidence, including her subsequent agreement. Additionally, as previously discussed, there was sufficient evidence for the jury to find that defendant was appreciably impaired and therefore driving while impaired. We hold that defendant was not prejudiced and find no error in the trial court's jury instructions.

III. Conclusion

¶ 24 For the forgoing reasons, we hold that the trial court did not err in denying defendant's motion to dismiss or in its jury instructions, and uphold the trial court's judgment.

NO ERROR.

Judges HAMPSON and CARPENTER concur.

Report per Rule 30(e).