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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-664

Filed 19 December 2023

Surry County, No. 20CRS50453

STATE OF NORTH CAROLINA

v.

LINDA DAYE GEORGE

Appeal by Defendant from Judgment entered 23 January 2023 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 20 November 2023.

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

W. Michael Spivey for Defendant-Appellant.

PER CURIAM.

Factual and Procedural Background

Linda Daye George (Defendant) appeals from a Judgment entered upon jury verdicts finding her guilty of Driving While Impaired (DWI) and Driving While License Revoked (DWLR). The Record before us tends to reflect the following:

On 31 March 2019, Defendant was cited for DWI and DWLR. On 3 March

2020, Defendant was found guilty in District Court on both charges. The District Court arrested judgment on the conviction of DWLR and imposed a 24-month suspended sentence with a 60-day active sentence. Defendant gave oral notice of appeal to Superior Court.

The matter was tried in Superior Court on 23 January 2023. At trial, Trooper Jason Vindich (Trooper Vindich) testified, among other things, that after he and a Sheriff's Deputy determined Defendant was operating her vehicle while appreciably impaired, he arrested Defendant and transported her to the Surry County Detention Center. At the Detention Center, Trooper Vindich requested Defendant submit to a breath test to determine her alcohol concentration. Trooper Vindich testified, on Defendant's first blow, "Defendant blew a .16." On the second, Defendant's "second breath was a .15." The ticket from the Intoxilyzer device used to administer the test was admitted into evidence without objection. The ticket reflects the test resulted in a "Reported AC: .15 g/210L".

At the close of the State's evidence and again after Defendant testified in her own defense, defense counsel moved to dismiss the charges against Defendant. The trial court denied the Motions. The case was submitted to the jury. The trial court instructed the jury that to convict Defendant of DWI, it had to find beyond a reasonable doubt:

First, that the Defendant was driving a vehicle; second, that the Defendant was driving the vehicle upon a highway within this state; and third, that at the time the Defendant

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was driving the vehicle, the Defendant had consumed sufficient alcohol that at any relevant time after driving, the Defendant had an alcohol concentration of .08 or more grams of alcohol per 100 milliliters of blood.

The jury was further instructed:

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the Defendant drove a vehicle on a highway in this state, and that when doing so, the Defendant had consumed sufficient alcohol that at any relevant time after driving the Defendant had an alcohol concentration of .08 or more in the Defendant's blood, it would be your duty to return a verdict of guilty.

The jury returned guilty verdicts on both the DWI and DWLR charges. In addition, the jury found, as aggravating factors to DWI, that at the time of the offense Defendant: (1) "Drove at the time of the current offense while the defendant's drivers [sic] license was revoked and the revocation was an impaired driving revocation under G.S. 20-28(a1)"; (2) had an alcohol concentration of at least .15 within a relevant time after driving; (3) was driving while her license was revoked; and (4) had at least one prior conviction of an offense involving impaired driving that occurred more than seven years prior to the date of this offense. The trial court entered Judgment on the DWI conviction, sentencing Defendant at the Level One punishment level to a suspended sentence of 24 months with an active sentence of 90 days. The trial court then entered Judgment on the DWLR conviction imposing a consecutive 120-day sentence to run at the expiration of the DWI sentence, suspended for 24

months. Defendant timely filed written Notice of Appeal to this Court on 2 February 2023.

Issue

The sole issue on appeal is whether there was substantial evidence to submit the DWI charge to the jury on the theory Defendant’s alcohol concentration was .08 or greater.¹

Analysis

Defendant contends the trial court erred in denying her Motions to Dismiss for insufficient evidence. Specifically, Defendant contends there was no evidence Defendant had an alcohol concentration of .08 or more grams of alcohol per 100 milliliters of blood—as the trial court instructed the jury—where the evidence reflected Defendant was administered a breath test that resulted in a reading of “Reported AC: .15 g/210L”. Defendant’s argument is without merit.

We review 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.* (citation omitted). To be substantial,

¹ Defendant does not challenge the conviction of DWLR.

the State must present “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citation and quotation marks omitted).

Here, Defendant was charged with the offense of DWI as defined in N.C. Gen. Stat. § 20-138.1. In relevant part, this statute provides:

(a) Offense. – A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration[.]

N.C. Gen. Stat. § 20-138.1 (2021). “The three essential elements of the offense of impaired driving are (1) driving a vehicle (2) upon any public vehicular area (3) while under the influence of an impairing substance or “[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of [0.08] or more.” ’ ’ *State v. Narron*, 193 N.C. App. 76, 79, 666 S.E.2d 860, 863 (2008) (alterations in original) (quoting *State v. Denning*, 316 N.C. 523, 524, 342 S.E.2d 855, 856-57 (1986) (quoting N.C. Gen. Stat. § 20-138.1)).

“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.’ ” *Id.* (quoting *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277

(2002)). Here, the State proceeded on the second method of proof by attempting to show Defendant had an alcohol concentration of .08 or more at a relevant time after driving. N.C. Gen. Stat. § 20-4.01(1b) defines the term “Alcohol Concentration” as:

The concentration of alcohol in a person, expressed either as:

- a. Grams of alcohol per 100 milliliters of blood; or
- b. Grams of alcohol per 210 liters of breath.

N.C. Gen. Stat. § 20-4.01(1b) (2021).

Here, Trooper Vindich testified Defendant blew a “.15” and a “.16”. “There is no requirement in the statute or elsewhere in our Motor Vehicle Code, Chapter 20 of our General Statutes, that a person’s alcohol concentration be expressed in terms of grams per milliliters of blood or liters of breath, nor have our courts interpreted G.S. 20-138.1 as requiring such specificity.” *State v. Jones*, 76 N.C. App. 160, 161, 332 S.E.2d 494, 494 (1985). Nevertheless, the printed ticket from the Intoxilyzer device was admitted into evidence reflecting “Reported AC: .15 g/210L”. “[T]he longstanding common law rule is that results of a chemical analysis are sufficient evidence to submit the issue of a defendant’s alcohol concentration to the factfinder[.]” *Narron*, 193 N.C. App. at 81, 666 S.E.2d at 864.

Defendant, however, contends the jury was instructed only on grams of alcohol per milliliter of blood and not on breath. Defendant makes no argument challenging the trial court’s instructions. Moreover, “the conversion factor (grams of alcohol per 210 liters of breath) used in section 20-4.01(0.2) is based on an assumed blood-breath

ratio.” *State v. Cothran*, 120 N.C. App. 633, 635, 463 S.E.2d 423, 424 (1995) (citing *State v. Brayman*, 751 P.2d 294, 297 (1988)). “In other words, the ‘assumption is that a [concentration of alcohol in breath] of .10 g/210L is equivalent to a [blood alcohol concentration] of .10%.’ ” *Id.* (alteration in original) (quoting 2 Richard E. Erwin, *Defense of Drunk Driving Cases* § 21.01 (3d ed. 1995)). As such, evidence Defendant had an alcohol concentration of .15 g/210L of breath is presumptive equivalent of .15 g/100 milliliters of blood. The evidence of Defendant’s alcohol concentration as shown by the results of a chemical analysis is sufficient to support submission of the DWI charge to the jury.

Thus, there was substantial evidence on which the jury could find Defendant guilty of DWI. Therefore, the trial court did not err in denying Defendant’s Motions to Dismiss. Consequently, the trial court did not err in entering Judgment upon Defendant’s conviction for DWI.

Conclusion

Accordingly, we conclude there was no error in Defendant’s trial and affirm the Judgments of the trial court.

NO ERROR.

Panel consisting of Judges ARROWOOD, HAMPSON, and GRIFFIN.

Report per Rule 30(e).