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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-795

Filed 4 June 2024

Onslow County, No. 17 CRS 55146

STATE OF NORTH CAROLINA

v.

COURTNEY ANNE DAVIS

Appeal by Defendant from judgment entered 8 March 2023 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 21 February 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Ronnie K. Clark, for the State.*

*Edward Eldred, for the Defendant.*

WOOD, Judge.

Courtney Davis (“Defendant”) appeals the judgment of the trial court following a jury verdict finding her guilty of driving while impaired (“DWI”). Defendant argues that because the State’s two witnesses did not specifically testify her mental and/or physical faculties were “appreciably impaired,” the trial court erred in denying her motion to dismiss. For the reasons stated below, we discern no error.

**I. Factual and Procedural History**

On 14 August 2017, Detective Robert Winners (“Detective Winners”) and Deputy Marshburn of the Onslow County Sheriff’s Office responded to a dispatch call regarding an assault at Harbor Point RV Park. The assault involved Defendant’s boyfriend, Michael Jones (“Jones”), with whom Defendant has children, and another man. As Detective Winners was working the call, Defendant arrived at the RV park to pick up her children and Jones. Defendant exited her Ford SUV and from approximately thirty to fifty feet away asked Detective Winners, “Where’s my kids?” Once Defendant located Jones and her children, they all left the RV park in Defendant’s vehicle. Defendant was “very upset” and emotional at the time she picked up her children. Detective Winners did not note that Defendant was impaired during the brief interaction. Detective Winners watched her drive away.

Once Defendant left the RV park, Detective Winners cleared the call and left the scene as well. While traveling down Turkey Point Road, Detective Winners noticed Defendant’s Ford SUV in a ditch on the side of the road approximately two miles from the RV park. He pulled over to check on Defendant and her passengers. Defendant and Jones were standing outside the vehicle and the children were seated inside the vehicle. Defendant stated she was driving down the road when another car went into her lane of travel, so she swerved and went into the ditch. Defendant informed Detective Winners that the Highway Patrol had been called and was on the

way, so Detective Winners left the scene. Detective Winners testified that during this ten-minute interaction, he did not observe any signs of impairment from Defendant.

Shortly after Detective Winners left, North Carolina State Highway Patrol Trooper Christopher Cross (“Trooper Cross”) responded to a dispatch call regarding a vehicle in a ditch along Turkey Point Road. Defendant told Trooper Cross that she was driving on Turkey Point Road towards Old Folkestone Road and ran off the road to avoid a large truck that had crossed the center line. Trooper Cross smelled a strong odor of alcohol from Defendant during the interaction and shifted his investigation to an impaired driving investigation. Trooper Cross noticed that Defendant had glassy, bloodshot eyes, her speech was thick “like she was speaking slowly,” and she had been crying. Trooper Cross asked Defendant to submit to a roadside Alco-Sensor test, a preliminary breath test, which is used to indicate the presence of alcohol on someone’s breath, and Defendant agreed. The results were positive for the presence of alcohol. Trooper Cross did not conduct any field sobriety test at the scene because there was not a suitable area to do so. Defendant later admitted to Trooper Cross she had consumed alcohol prior to arriving at the RV park to pick up Jones and her children.

During Trooper Cross’ investigation, Defendant was initially cooperative and then she would become upset and aggressive. During the investigation, no one other than Defendant indicated they were driving the vehicle. Defendant was placed under arrest for DWI and transported to the Onslow County Detention Facility.

After reading Defendant her implied consent rights at the Detention Facility, Trooper Cross asked Defendant to submit to an Intoxilyzer, a device used to measure the amount of alcohol in a person's breath, and she declined. Defendant refused all standard field sobriety tests at the Detention Facility. During this time, Trooper Cross did not observe that Defendant was unsteady on her feet or slurring her words; however, Defendant became verbally abusive and started beating on the table in the breathalyzer room. Trooper Cross had to "tussle" with Defendant to place her in handcuffs. Once Defendant realized she was going to jail, she recanted her story that she was the one driving the vehicle and stated that she was taking the blame for someone else, though she did not name the person.

After having been with Defendant for two to three hours, and based on her red, glassy eyes, speech, conduct, the strong odor of alcohol, her admission of consuming alcohol, and the positive results from the Alco-Sensor, Trooper Cross formed the opinion that Defendant "had consumed a sufficient amount of alcohol, an impairing substance, to affect her physical and mental capacities." Moreover, according to Trooper Cross, the National Highway Traffic Safety Administration's ("NHTSA") DWI detection guide states that driving off the side of the road demonstrates a fifty to seventy percent likelihood of a driver having a blood alcohol content of .08 or higher. **(T 53)**. Trooper Cross charged Defendant with Driving While Impaired and Reckless Driving.

According to Jones, Defendant already had been drinking when she arrived at the RV park to pick up him and the children. At trial, he testified that the police officers who responded to the dispatch call at the RV Park could tell she was intoxicated by the way she was acting and made him drive despite knowing he did not have a driver's license. Jones testified he also had been drinking. He claimed that when the accident happened, he was trying to pull over because he and Defendant were arguing, and he hit a slope going down into the ditch. While they were on the side of the road, Defendant got in the driver seat as he attempted to push the car out of the ditch. According to Jones, Defendant told Detective Winners and Trooper Cross she was driving to cover for him because he did not have a license. Jones testified he never informed Trooper Cross he was the one who had driven rather than Defendant.

On 19 September 2019, Defendant was found guilty of DWI and not guilty of reckless driving in Onslow County District Court. Defendant appealed to superior court, and her jury trial was held 6-8 March 2023. Defendant made motions to dismiss at the close of the State's case and at the close of all evidence. The trial court denied both motions. The jury found her guilty of Driving While Impaired on 8 March 2023.

On 15 March 2023, Defendant filed a written notice of appeal.

## **II. Analysis**

Defendant argues the trial court erred in denying the motions to dismiss the DWI charge because neither law enforcement officer testified her motor functions or mental faculties were appreciably impaired.

“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). Our Supreme Court has explained the standard of review of a defendant’s motion to dismiss as follows:

[T]he 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.

. . .

The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

*State v. Powell*, 299 N.C. 95, 98–99, 261 S.E.2d 114, 117 (1980) (citations omitted).

There are two ways by which the State may prove a defendant committed the offense of DWI. *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277–78 (2002). N.C. Gen. Stat. § 20-138.1(a) defines DWI in relevant part:

(a) . . . 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(a) (emphasis added). An “effect” on the defendant's faculties is not enough to sustain a conviction. *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985).

An alcohol screening test, an Alco-Sensor, is admissible to prove a defendant previously consumed alcohol but not to prove a particular concentration. N.C. Gen. Stat. § 20-16.3(d)(2). However, the results of a chemical analysis such as an Intoxilyzer may be admitted to prove a particular concentration of blood alcohol, and a defendant's refusal to submit to an Intoxilyzer test is not an admission of guilt but may be admitted as evidence to prove a defendant committed the offense of DWI. Specifically, N.C. Gen. Stat. § 20-139.1 states in pertinent part, “If 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) (2023).

“[I]t is a well-settled rule that a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal

observation.” *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000). “An officer’s opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer’s personal observation of an odor of alcohol and of faulty driving or other evidence of impairment.” *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002).

Here, although Detective Winners testified he did not note Defendant was impaired, Trooper Cross gave competent testimony regarding Defendant’s impairment. Specifically, Trooper Cross testified he had observed signs of impairment such as a strong odor of alcohol, red glassy eyes, and thick speech. Defendant admitted to drinking alcohol prior to arriving at the RV park, and Jones testified Defendant had been drinking before she arrived at the RV park to pick up their children. Trooper Cross responded to the scene where he observed Defendant had driven her vehicle off the road and into a ditch. Without objection or a request for a limiting instruction, Trooper Cross testified that the NHTSA DWI detection guide suggests driving off the side of the road demonstrates a fifty to seventy percent likelihood of a driver having a .08 or higher blood alcohol level. He was able to confirm the presence of alcohol with two positive samples on the Alco-Sensor, and Defendant declined to submit to an Intoxilyzer test as well as field sobriety tests after being read her implied consent rights. Trooper Cross also testified Defendant exhibited a range of emotions, and her mood would rapidly change from cooperative to irate to the point



he had to restrain her face down on the floor to put her in handcuffs at the detention center.

Defendant relies on *Harrington* in arguing that the officers were required to state specifically that Defendant's faculties were "appreciably" impaired. 78 N.C. App. at 45, 336 S.E.2d at 855. Under *Harrington*, the State must prove the defendant has "drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an *appreciable impairment* of either or both of these faculties." *Id.* (emphasis added). "An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired." *Id.*

Although Detective Winners did not testify that Defendant appeared intoxicated, Trooper Cross, who got in closer proximity to and spent significantly more time with Defendant, testified she was being affected by alcohol. While he did not specifically state the words, "Defendant's faculties were appreciably impaired," he testified that he formed an opinion that Defendant "had consumed a sufficient amount of alcohol, an impairing substance, to affect her physical and mental capacities." Thereafter, the prosecutor, still on direct examination, asked Trooper Cross, "And were you able to observe the defendant for a sufficient amount of time to form an opinion satisfactory to yourself as to whether the defendant consumed a sufficient amount of impairing substance to *appreciably impair* her mental or physical faculties or both?" (Emphasis added). Trooper Cross answered, "Yes, sir."

This testimony laid a foundation for the Trooper to offer his opinion as to Defendant's impairment. Trooper Cross did not provide an answer as to what his opinion was, only that he had formed an opinion. However, taken as a whole the evidence presented at trial, in the light most favorable to the State, demonstrated that the jury could reasonably conclude Defendant's faculties were appreciably impaired under N.C. Gen. Stat. § 20-138.1(a)(1). Trooper Cross' actual opinion as to appreciable impairment would have been relevant for the jury's consideration, but the absence of such an opinion did not undermine the sufficiency of the evidence in this case as to prevent the question from going to the jury.

Because sufficient evidence of all of the elements of DWI and that Defendant was the perpetrator was presented at trial, the trial court did not err in denying Defendant's motions to dismiss.

### **III. Conclusion**

For the foregoing reasons, we hold the trial court did not err in denying Defendant's motions to dismiss because there was substantial evidence Defendant's faculties were appreciably impaired pursuant to N.C. Gen. Stat. § 20-138.1(a)(1). Thus, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).