NO. COA01-796

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

STATE OF NORTH CAROLINA

v.

CHARLES LANDON COUSINS

Cabarrus County
Nos. 99 CRS 20064
99 CRS 20065
99 CRS 20067
99 CRS 20068
00 CRS 16536

Appeal by defendant from judgments entered 30 October 2000 by Judge C. Preston Cornelius in Cabarrus County Superior Court. Heard in the Court of Appeals 17 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Baucom & Robertson, by Scott C. Robertson, for defendant-appellant.

CAMPBELL, Judge.

On 27 November 1999, Defendant was arrested and charged with two counts of driving while impaired (DWI) in violation of N.C. Gen. Stat. § 20-138.1, two counts of driving while license revoked in violation of N.C. Gen. Stat. § 20-28, and one count of failure to stop at the scene of an accident resulting in property damage ("hit and run") in violation of N.C. Gen. Stat. § 20-166(c). Defendant pled guilty in district court to the two DWI charges and

the two driving while license revoked charges. In return, the hit and run charge was dismissed. Defendant subsequently appealed to superior court and the State reinstated the hit and run charge.

Defendant was tried and found guilty by a jury on all five charges. Defendant was sentenced to consecutive prison terms of 120 days for the driving while license revoked convictions. The hit and run conviction was consolidated for sentencing with one of the driving while license revoked convictions. Defendant was sentenced to consecutive two year prison terms for the DWI convictions, with the terms set to run at the expiration of the driving while license revoked sentences. In sum, defendant was sentenced to four years and 240 days in prison.

The State's evidence at trial tended to show that on the night of 27 November 1999, Wilbert Beaston ("Beaston") was traveling on Old Charlotte Road in Cabarrus County approaching the intersection with Highway 601. As Beaston approached the intersection, he noticed that a truck being driven by defendant appeared to be initiating a right turn on red onto Old Charlotte Road into Beaston's lane of travel. Beaston saw defendant's truck stop so he proceeded through the intersection. As Beaston continued through the intersection, defendant's truck accelerated through the red light, slamming into Beaston's truck and spinning it around in the intersection.

Following the collision, defendant got out of his truck and walked over to Beaston's truck. From approximately ten feet away, defendant began pointing his finger at Beaston and yelling, "It was

your fault, it's your fault. I'm not taking the blame for this." Beaston testified that defendant was "kind of staggering," was "looking around like he was dazed," and was "very loud and argumentative."

Defendant then walked over to a white Chevy Cavalier that had been traveling behind him prior to the accident. Defendant's wife and two children had gotten out of the Cavalier. Defendant and his wife got into an argument over whether defendant should stay and take responsibility for the accident. Defendant's wife insisted that he stay, but defendant refused. Instead he got into the Cavalier and drove away from the accident scene.

Officer Richard Hooper ("Officer Hooper") arrived at the scene of the accident, spoke briefly with Beaston, and was then directed to defendant's wife, who was still at the scene. Defendant's wife told Officer Hooper that she had been following defendant when he was involved in the accident in the intersection, and, after the accident, defendant had taken her vehicle (the Cavalier) and left the scene. Officer Hooper testified that he, or one of the other officers at the scene, then radioed in a description of the Cavalier along with defendant's name. A few minutes later, Officer J.C. Worth ("Officer Worth") radioed to the scene that he had located both defendant and the Cavalier.

Officer Worth testified that defendant was in the driver's seat of the Cavalier when it was located. The vehicle was stationary and the engine was not running. Officer Worth asked defendant to step out of the vehicle and defendant did so. Officer

Worth testified that defendant "appeared unbalanced" and had to use the vehicle for support, that defendant staggered when he walked, and that defendant's speech was "mumbled." Although Officer Worth did not administer any sobriety tests on defendant, it was his opinion that defendant's mental and physical faculties were appreciably impaired.

Officer Hooper then arrived at the location where Officer Worth was holding defendant. Officer Hooper asked defendant "if he had had anything to drink," and defendant responded that he had not. Officer Hooper testified that defendant "appeared very unsteady, not able to move around very well[,] just sort of generally incoherent and not really the way you would expect a normal person to be acting and moving around." Officer Hooper asked defendant if he had been injured in the earlier accident, and defendant replied that he had not. Defendant did not have a driver's license to give to Officer Hooper, and, upon checking, Officer Hooper discovered that defendant's license had been revoked.

Defendant then agreed to submit to a roadside breath test. The results of the test were 0.0, indicating that there was no alcohol present. Officer Hooper then asked defendant to perform some field sobriety tests. Officer Hooper testified that defendant performed "very poorly" on the walk-and-turn test, was unable to stand as instructed, had to use his arms for balance throughout the test, and "missed heel to toe contact more times than he made it." Defendant stopped during the middle of the test and told Officer

Hooper, "Look, I haven't been drinking but I'm taking pain medication." Upon inquiry, defendant told Officer Hooper that he had been taking Lortab, a pain killer.

Officer Hooper then asked defendant to perform the one-leg stand test. Officer Hooper testified that defendant also performed poorly on the one-leg stand test, unable "to keep his foot up for more than two or three seconds at a time." Finally, defendant voluntarily stopped the test and told Officer Hooper "to go ahead and arrest him." After defendant was arrested Officer Hooper transported him to a medical center where he advised defendant of his rights regarding the giving a blood sample. Defendant refused to submit to a blood test.

The State also introduced into evidence a Motor Vehicle Records Check from the Division of Motor Vehicles indicating that defendant's driver's license had been suspended indefinitely on 13 April 1999 for failure to appear in court. The State also introduced into evidence a copy of a notice of revocation dated 12 February 1999 notifying defendant that his license was subject to indefinite revocation as of 13 April 1999 for failure to appear.

Defendant raised thirteen assignments of error in the record on appeal. Defendant has expressly abandoned assignments of error six, twelve, and thirteen in his brief to this Court. We further note that defendant has failed to cite any authority in support of assignments of error one, two, three, seven, eight and eleven. Accordingly, these assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2002) ("The body of the argument shall

contain citations of the authorities upon which the appellant relies."); *State v. McNeill*, 140 N.C. App. 450, 537 S.E.2d 518 (2000); *State v. Stevenson,* 136 N.C. App. 235, 523 S.E.2d 734 (1999). We turn to those assignments of error properly set out and supported in defendant's brief.

Defendant contends that the trial court erred in denying his motion to dismiss the two DWI charges for insufficiency of the evidence.

In ruling on a motion to dismiss, 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. *State v. Fritsch,* 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). In reviewing the evidence, it must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson,* 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Fritsch,* 351 N.C. at 379, 526 S.E.2d at 455. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *State v. Bullard,* 312 N.C. 129, 322 S.E.2d 370 (1984). Circumstantial evidence may be enough to withstand a motion to dismiss if a reasonable inference of guilt may be drawn therefrom. *Fritsch,* 351 N.C. at 379, 526 S.E.2d at 455. "When ruling on a motion to dismiss, the trial court should

be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *Id.*

N.C. Gen. Stat. § 20-138.1 (2001) 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;
>
> . . . .

N.C. Gen. Stat. § 20-4.01(14a) (2001) defines an impairing substance as "[a]lcohol, [a] controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances."

The offense of driving while impaired is proven by evidence that the defendant drove a vehicle after ingesting a sufficient quantity of an impairing substance to cause his physical and mental faculties to be appreciably impaired. N.C.G.S. § 20-138.1(a); *State v. Phillips*, 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997); *State v. George,* 77 N.C. App. 580, 582-83, 335 S.E.2d 768, 770 (1985). Defendant contends that the State failed to present sufficient evidence that his condition was caused by an impairing substance. We disagree.

Wilbert Beaston testified that defendant ran a red light and slammed into Beaston's truck. When defendant got out of his truck, Beaston observed that he "was kind of staggering," "looking around like he was dazed," and "very loud and argumentative." Officer

Hooper testified that defendant "appeared very unsteady, not able to move around very well, just sort of generally incoherent[.]" Officer Hooper also testified that defendant performed "very poorly" on two field sobriety tests. In addition, defendant refused to submit to a blood test to reveal the substances present in his system. This evidence, coupled with defendant's admission to having taken Lortab, a painkiller, was sufficient evidence to show that defendant was impaired and that his impairment was caused by an impairing substance. Contrary to defendant's assertion, the State was not required to produce expert testimony concerning the impairing effects of Lortab and whether defendant's condition was consistent with what would be expected of someone who had taken Lortab. Therefore, we conclude that the trial court did not err in denying defendant's motion to dismiss the two DWI charges.

Defendant next contends that the trial court erred in denying his motion to dismiss the two driving while license revoked charges. Specifically, defendant contends that the State presented insufficient evidence of defendant's knowledge that his license was revoked.

To convict defendant under N.C.G.S. § 20-28(a) of driving while his license was revoked, the State had to prove (1) that he operated a motor vehicle (2) on a pubic highway (3) while his operator's license was suspended or revoked , and (4) that he had actual or constructive knowledge of the suspension or revocation. *State v. Atwood,* 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976); *State v. Woody*, 102 N.C. App. 576, 578, 402 S.E.2d 848, 850 (1991);

State v. Chester, 30 N.C. App. 224, 226 S.E.2d 524 (1976). A rebuttable presumption that a defendant had knowledge that his license was revoked at the time charged arises "when, nothing else appearing [the State] has offered evidence of compliance with the notice requirements of G.S. 20-48 . . . ." *Chester*, 30 N.C. App. at 227, 226 S.E.2d at 526; *see also Atwood*, 290 N.C. at 271, 225 S.E.2d at 545. If the defendant does not present any evidence to rebut this presumption, it is not necessary for the trial court to instruct on guilty knowledge. *Chester,* 30 N.C. App. at 227, 226 S.E.2d at 526. However, "where there is *some* evidence of failure of defendant to receive the notice or *some* other evidence sufficient to raise the issue, then the trial court must, in order to comply with G.S. 1-180 and apply the law to the evidence, instruct the jury that guilty knowledge by the defendant is necessary to convict." *Id.* at 227-28, 226 S.E.2d at 527 (emphasis in original). When all the evidence shows that the defendant did not receive notice of revocation, a motion to dismiss should be granted. *Id.*

In the instant case, the State admitted into evidence a copy of a notice of revocation dated 12 February 1999 which provided that defendant's license was to be suspended indefinitely for failure to appear in court effective 13 April 1999. The State also admitted into evidence a certification signed by the Commissioner of Motor Vehicles and a DMV employee stating that the revocation order was mailed to defendant at the address shown in DMV's records (117 Cascade Drive). The rebutting evidence presented by defendant

is that at the time of his arrest he no longer lived on Cascade Drive. There was no evidence presented that defendant did not live on Cascade Drive at the time the revocation notice was sent. The record further shows that the trial court instructed the jury that they must find that defendant had actual knowledge of the revocation in order to convict him. Accordingly, we conclude that the State presented sufficient evidence of defendant's knowledge to get to the jury, and the trial court instructed the jury in accordance with this Court's holding in *Chester*. Defendant's assignment of error is overruled.

Defendant's final assignment of error is that the trial court erred in proceeding with defendant's trial in his absence. We disagree.

"It is well established that both the United States and North Carolina Constitutions provide criminal defendants the right to confront their accusers at trial." *State v. Richardson,* 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991). However, in noncapital trials, it is also well established that this right to confrontation may be waived by a defendant, *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985), and a defendant's voluntary and unexplained absence from court after trial commences constitutes such a waiver. *State v. Wilson,* 31 N.C. App. 323, 327, 229 S.E.2d 314, 317 (1976). "Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred." *Richardson,* 330 N.C. at 178, 410 S.E.2d at 63.

In the instant case, following opening statements and prior to the trial court hearing evidence on defendant's motion to suppress, defendant voluntarily left the courtroom to go to the restroom. The trial court then adjourned for lunch. Following lunch, defendant did not return to the courtroom and the trial court proceeded with defendant's motion to suppress. Following the trial court's ruling on defendant's motion to suppress, defendant still had not returned to the courtroom and the trial court concluded that defendant had waived his right to be present. Defendant's absence was not sufficiently explained to the court, thus, we conclude that the trial court correctly concluded that he waived his right to be present. *See State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

For the foregoing reasons, we hold that defendant received a fair trial free from prejudicial error.

No error.

Judges WALKER and McGEE concur.

Report per Rule 30(e).