NO. COA11-669
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Anson County
Nos. 08 CRS 24
08 CRS 700074

AUTUMN D. BOSTICK

Appeal by defendant from judgments entered 10 November 2010 by Judge Tanya T. Wallace in Anson County Superior Court. Heard in the Court of Appeals 28 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.

Mercedes O. Chut for defendant-appellant.

ELMORE, Judge.

Autumn D. Bostick (defendant) was charged by citations with driving while impaired, driving while license revoked, and displaying a driver's license with knowledge it was suspended. She was found guilty of the charges in district court. She appealed to superior court. At the close of all the evidence, the superior court dismissed the charge of displaying a driver's

license with knowledge that it was suspended. The jury returned verdicts finding defendant guilty of the remaining two offenses. The court entered judgments sentencing defendant to twelve months in prison for driving while impaired and to forty-five days in prison for driving while license revoked. The court suspended both sentences and placed defendant on supervised probation for twenty-four months. Defendant appeals.

The State presented evidence tending to show that, on the evening of 4 January 2008, Corporal Josh Beam of the Anson County Sheriff's Office saw a truck travel on Highway 52 and Plank Road and then into the parking lot of the FastShop, a store that was closed, in Ansonville. Corporal Beam saw a woman, whom he recognized as defendant based upon personal knowledge, get out of the driver's side of the vehicle. Corporal Beam observed that, as defendant walked around the vehicle, she was unsteady on her feet.

Knowing that defendant's driver's license had been revoked, Corporal Beam approached defendant and started talking to her. While obtaining information from defendant, Corporal Beam observed that defendant's eyes were bloodshot and red and that her speech was slurred. Corporal Beam noticed an "odor of alcohol coming from her." Corporal Beam formed the opinion that

defendant had consumed "a sufficient amount of an impairing substance to appreciably impair her mental and physical faculties."

Corporal Beam reported the information to his dispatcher, and after confirming that defendant's license was revoked, Corporal Beam asked that the Highway Patrol be dispatched to the scene. During the time Corporal Beam interacted with defendant, the truck's lone passenger remained in the passenger seat of the truck. Corporal Beam did not see any movement inside the truck after it had stopped but before defendant emerged from it.

Trooper David Burr of the North Carolina Highway Patrol responded to the dispatch at 11:20 that evening. He observed that defendant's eyes were bloodshot and glassy and that she was unsteady on her feet. After smelling alcohol on defendant's person, Trooper Burr formed the opinion that defendant was intoxicated. He placed defendant under arrest for driving while impaired. He transported her to the Anson County Sheriff's Office, where he administered a breath test on the Intoxilyzer Model 5000. The machine reported defendant's alcohol concentration as .09.

Trooper Burr also conducted sobriety field tests after administering the Intoxilyzer test. Defendant was "shaky from

side to side" as she performed the walk-and-turn test. Defendant was also "shaky" on the one-legged stand test. Defendant failed to follow the officer's instructions as she took more steps than she was directed to take, and she failed to place her hands by her side as she performed the one-legged stand test. She performed the third test, the finger-to-nose, without error.

Trooper Burr also conducted a check of the driver's license he had been given by defendant and determined that the license had been suspended or revoked indefinitely on 8 December 2007.

Defendant did not present any evidence.

Defendant contends that the trial court erred by failing to dismiss the charges of driving while impaired and driving while license revoked. Defendant argues that the evidence was insufficient to support the convictions. The State responds that this issue is not properly before this Court because defendant did not make a motion at trial to dismiss those charges.

The transcript shows that, at the close of the State's evidence, defendant made a motion to dismiss and argued to the court that the State had not proven "the display of license known to be suspended or revoked." The court agreed and

dismissed that charge. Defendant's counsel next stated: "And in all candor with the Court, although I would make a motion to dismiss everything else, I think there's probably enough to go to the jury on the rest of it." The court replied, "All right." Defendant's counsel and the prosecutor agreed that the prosecutor had voluntarily dismissed one other charge of failure to carry a registration card. The court then proceeded to the charge conference without receiving any further evidence.

In order to challenge the sufficiency of the evidence to take a criminal charge to the jury, a defendant must have made a motion to dismiss at the close of the evidence. N.C.R. App. P. 10(a)(3) (2011). In addition, the defendant must have given the court the opportunity to rule upon the motion. N.C.R. App. P. 10(a)(1) (2011). By telling the court that he thought the evidence was sufficient to go to the jury on the other charges, defendant's counsel effectively withdrew or abandoned the motion to dismiss the other charges, and the court did not enter any ruling upon that motion. The issue, therefore, is not properly presented for review. Notwithstanding, in our discretion, we apply Appellate Rule 2 and consider the merits of defendant's argument. N.C.R. App. P. 2 (2011).

Upon a motion to dismiss for insufficient evidence, the trial court determines whether there is substantial evidence to establish each essential element of the offense charged and to identify the defendant as the perpetrator. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). In deciding a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981).

One commits the offense of driving while impaired if one drives any vehicle upon any highway, street, or public vehicular area while under the influence of an impairing substance or after having consumed sufficient alcohol to render an alcohol concentration of .08 or more. N.C. Gen. Stat. § 20-138.1(a) (2009). One drives or operates a vehicle if one is "in actual physical control of a vehicle which is in motion or which has the engine running." N.C. Gen. Stat. § 20-4.01(25) (2009). One is "under the influence of an impairing substance" if one's

"physical or mental faculties, or both, [are] appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48b) (2009).

Defendant contends that the evidence is insufficient to show that she (1) drove or operated the truck (2) while under the influence of an impairing substance. She argues Corporal Beam did not actually see her operate or drive the vehicle, i.e., see her in control of the vehicle while it was in motion or with the engine running. She also argues that the evidence failed to show her mental or physical faculties were impaired by alcohol.

We reject defendant's arguments. Corporal Beam saw the vehicle travel on Highway 52 and Plank Road. He saw defendant exit on the driver's side of the vehicle after it stopped in the store parking lot. He saw only one other person in the vehicle, and that person remained in the same passenger seat during the entire time the officer spoke with defendant. He did not see any movement in the vehicle before defendant exited. Based upon this circumstantial evidence, we conclude that a jury could reasonably find that defendant drove or operated the vehicle.

"While a showing of a slight effect on defendant's faculties is insufficient for a conviction of driving while

impaired, . . . one need not be 'drunk' to be found guilty. . . . Rather, a 'noticeable,' 'perceptible,' 'obvious,' 'detectable' or 'apparent' impairment may be sufficient to find appreciable impairment of mental and/or physical faculties." *State v. Roach*, 145 N.C. App. 159, 163, 548 S.E.2d 841, 844-45 (2001) (citations omitted). Evidence sufficient to withstand a motion to dismiss may consist of an officer's opinion, based upon the officer's personal observation of the defendant exhibiting manifestations of impairment such as slurred speech, glassy or bloodshot eyes, or unsteadiness afoot, that the defendant is impaired. *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002).

In the case at bar, both officers testified that, in their opinions, defendant was impaired by alcohol. Their testimony shows that defendant exhibited the odor of alcohol on her person, bloodshot or bloody eyes, slurred speech, unsteadiness on her feet, and impairment of her mental faculties as demonstrated by her inability to follow instructions. Finally, the evidence shows that defendant had a blood alcohol concentration of .09. Based upon this evidence, we conclude that a jury could reasonably find that defendant was impaired by an impairing substance.

Defendant also contends that the evidence is insufficient to show that she drove while her operator's license was revoked because the evidence failed to show that she drove the vehicle. For the reasons stated above, we conclude that the evidence was sufficient for a jury to find that she drove the vehicle.

As we find sufficient evidence to support submission of the charges to the jury, we conclude that the court did not err by so doing. Accordingly, we find no error in defendant's trial or sentence.

No error.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).