IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-614

No. COA21-437

Filed 6 September 2022

Cleveland County, No. 16 CRS 51838

STATE OF NORTH CAROLINA

v.

RAYMOND TRACY MINTZ, JR., Defendant.

Appeal by defendant from judgment entered on or about 23 February 2021 by Judge Todd Pomeroy in Superior Court, Cleveland County. Heard in the Court of Appeals 8 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Jaren Kelley, for the State.

Arnold & Smith, PLLC, by Paul A. Tharp, for defendant.

STROUD, Chief Judge.

¶ 1 Defendant appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired. Defendant argues the trial court abused its discretion and violated his constitutional rights by denying his motion to continue as well as by granting the State's motion to continue, and the trial court erred by denying his motion to dismiss because the State's evidence was insufficient to support

his conviction. We find the trial court did not abuse its discretion as to the motions to continue and did not err as to Defendant's motion to dismiss.

I. Background

¶ 2 The State's evidence tended to show that at approximately 3:00 in the morning on 30 April 2016, Officer Chase McCraw with the Shelby Police Department was on patrol and saw "a two-door hatchback-style Mustang in the side parking lot of the Village Pantry" in Cleveland County. The Mustang was stationary, but when Officer McCraw approached the Mustang he "could see exhaust coming from the exhaust system, so [he] knew the vehicle was running."

¶ 3 After briefly observing the Mustang, Officer McCraw "pulled into that side parking lot[,] . . . pulled up behind the vehicle, exited [his] patrol vehicle, . . . and then [he] approached the driver's side of the vehicle." Officer McCraw noticed the driver, later identified as Defendant, "was slumped over to his right side. He was still seat-belted into the vehicle. His eyes were closed. And [Officer McCraw] could see a little bit of drool or spittle dribbling from his mouth." The Mustang "was a manual transmission, a straight drive[,]" and "[i]t appeared to be in neutral. [Since] Mr. Mintz's foot was on the brake, . . . the only thing that was holding that vehicle in place was his foot on the brake."

¶ 4 Officer Valmore Omondi then arrived at the Village Pantry. Together, Officers Omondi and McCraw were able to rouse Defendant, who was still seated in the car,

but Defendant "sat up, looked around the vehicle, never really made contact with Officer Omondi or [Officer McCraw], and then he closed his eyes once more" and stayed "in a seated position." Eventually, Defendant "did open his eyes and look around, and he rolled down the driver's window." Officer McCraw "observed [Defendant's] eyes were red and glassy in appearance" and Defendant strongly smelled like alcohol. Defendant refused eye contact with officers, revved the Mustang's engine, then pulled the Mustang forward "approximately 10 to 15 feet" against officer instructions. Defendant turned off the vehicle when the officers instructed him to do so but he did not place his keys on the passenger seat and continued to "manipulate the parking break [sic][.]" Defendant "appeared confused and was trying to explain to [the officers] what he was trying to do."

¶ 5 When asked to provide identification, Defendant "pulled out his cell phone . . . ." Officer McCraw told Defendant "that was not his identification," and Defendant asserted "he was calling a ride." Defendant "pulled up a contact on his phone, and then he added numbers onto that contact, so the total numbers on the screen was about 20 numbers, . . . and he attempted to call this as his ride." Defendant "was very eager to exit the vehicle[,]" and after he "place[d] the keys in the ignition to start the vehicle once more" officers became concerned Defendant might attempt to drive the Mustang away again. The officers then allowed Defendant to get out of the Mustang.

¶ 6 Defendant "appeared unsteady on his feet[,]" and leaned against the Mustang

while talking to the officers. "His speech was very slurred and slow[,] [and] his eyelids were sitting very low." When Officer McCraw asked if Defendant had consumed any alcohol, Defendant "said he hadn't consumed any." Defendant stopped responding to Officer McCraw's questions and repeatedly stated "I'm calling a cab[.]" Eventually Defendant began answering questions with, "I'm calling the police[,]" then answering he was calling his attorney. Defendant refused to perform field sobriety tests and was unable to contact anyone on his cell phone because "he was just pressing the pound key over and over." Defendant also took "approximately 15 or 20 seconds to remove his identification card from his wallet" when asked to by Officer McCraw. Defendant was not offered a breathalyzer test before his arrest, and after Defendant was arrested "Officer Omondi took [Defendant] to the jail where he attempted to administer the Intoxilyzer test." The State corroborated Officer McCraw's testimony via body-camera footage of Officer McCraw's interaction with Defendant; this video was published to the jury at trial.

¶ 7 After Officer Omondi took Defendant to the jail, Officer Omondi advised Defendant he had rights relating to a breathalyzer test. Defendant was read these rights and a copy of the chemical analysis rights form was provided to Defendant, but Defendant refused to sign the form. Defendant refused the breathalyzer test, and Officer Omondi applied for a search warrant for a blood test. The search warrant was issued, and a nurse at the jail drew Defendant's blood for testing. Officer Omondi

testified the sample was sent to the State Crime Lab, and State's expert witness testified it was then forwarded to NMS Labs in Pennsylvania. Defendant's blood was tested and this analysis showed a blood alcohol concentration ("BAC") of 0.14.

¶ 8 Defendant was tried and found guilty of driving while impaired in Cleveland County District Court in 2017. Defendant appealed to Cleveland County Superior Court, where Defendant was tried and ultimately convicted by a jury of driving while impaired ("DWI") under North Carolina General Statute § 20-138.1 on 23 February 2021. Defendant's appeal addresses a number of pretrial motions, and we address the circumstances surrounding those motions below.

II. Petition for Writ of Certiorari

¶ 9 On 16 March 2021, Defendant filed an untimely *pro se* "notice of appeal," (capitalization altered), and he has filed a petition for writ of certiorari. He acknowledges that "his statutory right to appeal under N.C. Gen. Stat. §§ 7A-27 and 15A-1444(a) was most likely waived for failure to enter [timely] notice of appeal in compliance with N.C. R. App. P. 4," but he contends that his case presents "appropriate circumstances" to permit review. *See State v. Gardner*, 225 N.C. App. 161, 164, 736 S.E.2d 826, 829 (2013). The State's response to Defendant's petition for certiorari acknowledges that it is within this court's discretion to allow the petition. In our discretion, we allow Defendant's petition for certiorari. *See generally* N.C. R. App. P. 21; *id.* at 165, 736 S.E.2d at 829 ("We have also held that where a defendant

has lost his right of appeal through no fault of his own, but rather as a result of the actions of counsel, failure to issue a writ of *certiorari* would be manifestly unjust." (citation omitted)).

III. Analysis

¶ 10 Defendant argues (1) "[t]he trial court erred when it denied Defendant's motion to dismiss" due to insufficient evidence; (2) "[t]he trial court erred when it denied Defendant's motion to dismiss" because his due process rights were violated; (3) "[t]he trial court's denial of Defendant's motion to continue violated" Defendant's due process rights and was also an abuse of discretion by the trial court; and (4) "[t]he trial court's granting of the State's motion to continue over Defendant's objection was an abuse of discretion." Because the trial court's rulings on the motions to continue occurred before the trial, we will address Defendant's arguments on the motions to continue first.

¶ 11 As a preliminary matter, despite the constitutional arguments presented in Defendant's brief, Defendant did not raise any constitutional objections or issues before the trial court. He made a general motion to dismiss based on insufficiency of the evidence at the close of State's evidence, and his motion to continue did not state any constitutional basis. Defendant also filed no motion to suppress or motion regarding his rights to have a witness present during blood alcohol testing after his arrest. Defendant's brief acknowledges that "his appointed counsel did not voice a

specific objection relating to the denial of Defendant's opportunity to contact witnesses in his favor" but argues that "Defendant invoked this right unequivocally, such that it became a part of the State's testimony, notwithstanding Defendant's silence at trial." (Emphasis removed.) Upon review of the entire record, we cannot find any indication of evidence or argument regarding Defendant's access to a witness as might be implicated by *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971), which is the main case Defendant cites in his argument. As the State notes, Defendant's argument in this regard, if he had raised one at trial, would instead have been based upon *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). *Id.* at 545, 369 S.E.2d at 564 ("We therefore agree with the Court of Appeals that, in those cases arising under N.C.G.S. § 20-138.1(a)(2), prejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief.")

¶ 12 Either way, Defendant simply did not present any constitutional issues or any issue regarding access to witnesses after his arrest to the trial court in any manner. Thus, we will not consider his arguments on appeal as to any violation of his constitutional rights based upon the denial of his motion to dismiss or his motion to continue. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the

specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."); *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.")). We will address Defendant's remaining arguments.

A. State's Motion to Continue

¶ 13 Defendant's case was originally adjudicated in the Cleveland County District Court on 30 October 2017. Defendant appealed to the Superior Court 1 November 2017 and the case was eventually calendared for 16 February 2021. July selection was completed on 16 February 2021 and a recess was taken between 16 February 2021 and 18 February 2021. Immediately before the proceedings reconvened on 18 February 2021, Defendant stated that he refused to sign a stipulation that his counsel and the State had previously agreed upon to allow the State to present the blood alcohol report in lieu of testimony from the laboratory analyst who oversaw the blood alcohol analysis completed in connection with his arrest. The State then moved for a continuance based upon the need for the analyst to testify. The State's motion to continue was allowed, and the trial was rescheduled for the following Monday, 22 February 2021. Defendant challenges the trial court's ruling granting the State's 18 February 2021 motion to continue.

1. Standard of Review

¶ 14 Our Supreme Court recently held:

> [A] motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. If, however, the motion is based on a right guaranteed by the Federal and State constitutions, the motion presents a question of law and the order of the court is reviewable. Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error.

Matter of L.A.J., 2022-NCSC-54, ¶ 7 (quoting *In re M.J.R.B.*, 377 N.C. 453, 2021-NCSC-62, ¶ 11 (cleaned up)).

¶ 15 "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.").

2. Analysis

¶ 16 Defendant argues the State had more than enough time "to secure the presence of the laboratory analyst for Defendant's trial." He also argues "the extreme delay

between Defendant's trials in District Court and Superior Court should have mitigated squarely against the granting of a continuance to an unprepared prosecution." The State argues there "are sound reasons why the trial was continued[,]" including that Defendant changed his mind about a stipulation immediately before trial, which caused the State to need to "secure the presence of the laboratory analyst" for the Defendant's trial.

¶ 17 During a pre-trial conference, Defendant informed the State that, contrary to other pre-trial discussions, he would not sign a stipulation to use the blood test completed after Defendant's arrest as evidence without calling the analyst to testify. The State advised the trial court that counsel had "been in contact with [Defendant's attorney] on more than one occasion as to whether or not [they] needed the lab analyst, who is a resident of Pennsylvania, [to] come and testify . . . ." Defendant's trial counsel had indicated "[o]n numerous occasions . . . that his client and [Defendant's attorney] would stipulate to the lab report being entered and the testimony of the lab analyst would not be needed."

¶ 18 Approximately 45 minutes to an hour prior to the pre-trial conference, Defendant then changed his mind and refused to sign the stipulation. The State was unable to call its witness because of a snow storm in Pennsylvania, where the witness lived. The witness had been subpoenaed but was not present because of the parties' prior discussions regarding the stipulation. Because the stipulation would no longer

be entered, Defendant's attorney acknowledged the lab analyst "would definitely be required" to proceed with the case, and Defendant's counsel did not object to the State's motion to continue.

¶ 19 The trial court's decision to grant State's motion given the circumstances of this case does not show a ruling "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *White*, 312 N.C. at 777, 324 S.E.2d at 833. The lab analyst was not present because the Defendant himself demanded her testimony at the last moment, after previously indicating he would sign a stipulation that rendered her testimony unnecessary. After hearing from both parties, the trial court concluded:

> Based upon the State's contention that there was at least a tacit agreement that the testimony of the lab analyst would not be necessary in this case, that there would be a stipulation, the stipulation had been signed by defense counsel and then the defendant refused to sign it. . . .
>
> In the exercise of discretion I'm going to allow this case to be continued.

The trial court considered the circumstances of the case and came to a reasoned decision to continue the case in light of Defendant's last-minute change in position as to the blood test stipulation. We hold the trial court committed no abuse of discretion.

B. Defendant's Motion to Continue

1. Standard of Review

¶ 20 We review the trial court's denial of Defendant's motion to continue under the

same abuse of discretion standard introduced above. *See Matter of L.A.J.*, ¶ 7; *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *White*, 312 N.C. at 777, 324 S.E.2d at 833. The trial court's ruling will only be reversed upon a showing that "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *White*, 312 N.C. at 777, 324 S.E.2d at 833.

2. Analysis

¶ 21 After proceedings resumed on 22 February 2021, Defendant made a motion to continue to substitute private, retained counsel for his appointed attorney because Defendant believed his appointed attorney had several "conflicts of interest that [Defendant] didn't agree with." The trial court, after hearing Defendant's arguments, denied his motion to continue. Defendant challenges the denial of his motion.

¶ 22 Defendant argues that the trial court's denial of his motion to continue was an abuse of discretion, that he suffered prejudice, and that he properly preserved his constitutional arguments for review. He argues his motion should have been granted "due to his newly retained counsel's prior obligations and need for time to familiarize himself with Defendant's case." The State argues Defendant's "right to choose [his] counsel is not absolute[,]" and Defendant has lost that right because he "pervert[ed] that right to a weapon for the purpose of obstructing and delaying his trial." We hold the trial court did not abuse its discretion in denying Defendant's motion.

¶ 23 As discussed above, Defendant's case was previously continued on 18 February 2021, based upon the State's motion to continue due to the need for testimony from an expert witness from Pennsylvania. Defendant made his motion to continue on 22 February 2021, the first day of the rescheduled trial, immediately after the trial judge had given prospective jurors introductory instructions. Defendant was still represented by his appointed counsel who had represented him since 13 May 2019, and the record does not show his appointed counsel filed a motion to withdraw.

¶ 24 In support of his motion to continue, Defendant argued he had retained new counsel over the previous weekend, that he wished his new trial counsel to represent him going forward, and that his new counsel needed "time to familiarize himself with Defendant's case." But Defendant's alleged privately retained counsel was not present at the time Defendant made his motion. Additionally, the record does not show that Defendant's private counsel ever entered a Notice of Appearance or otherwise represented Defendant in any capacity. After the trial court allowed Defendant and the District Attorney to contact Defendant's alleged private counsel, Mr. David Teddy, Defendant's appointed counsel confirmed that Defendant told him the prior week that Defendant had retained private counsel, but Defendant did not tell appointed counsel who Defendant's new counsel was. When Defendant's appointed counsel was asked by the trial court whether he was "satisfied to your professional responsibility that you think you can continue representing [Defendant]

like you do other clients to the best of your ability?" appointed counsel answered "[y]es, sir."

¶ 25 Defendant argues this case is similar to *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). However, *McFadden* is distinguishable. In *McFadden*, our Supreme Court reversed this Court's decision finding the trial court committed no error in denying the defendant's motion for a continuance. 292 N.C. at 610, 617, 234 S.E.2d at 744, 747. But in *McFadden*, Defendant's counsel of choice "had been employed for a period of about five months . . . ." *Id.* "On Friday of the previous week[,]" when the case was originally called for trial, the defendant's counsel "asked the District Attorney to continue the case because of his pending case in the United States District Court." *Id.* at 610, 234 S.E.2d at 744. On the first day of trial, one of the defendant's counsel's "junior associates[] appeared in court and informed [the trial judge] that [defendant's counsel] was engaged in a trial in the United States District Court for the Middle District . . . and requested that the case be continued or held open for trial in the event that [defendant's counsel] should become available." *Id.* at 610, 234 S.E.2d at 743. The trial court denied the motion and ordered the defendant's counsel's associate, who was unfamiliar with the case, to represent the defendant. *Id.* at 611, 234 S.E.2d at 744. The facts in *McFadden* are unlike the present case.

¶ 26 Here, Defendant informed the trial court he had privately retained David

Teddy as his attorney, but Mr. Teddy was not present in the courtroom when Defendant's case was called. Mr. Teddy had not appeared or previously represented Defendant in connection with this case. No person associated with Mr. Teddy was present in the courtroom. The trial court granted a recess for both Defendant and the District Attorney to contact Mr. Teddy, and after the proceeding resumed, the District Attorney informed the court that Mr. Teddy said "Mr. Mintz did come to see him, but [Mr. Teddy] told [Defendant] *he would not be getting in the case on this short notice*; however, *if it was continued*, [Mr. Teddy] would be happy to help." (Emphasis added.) Defendant also said, when he was contacted by his appointed counsel on the Friday preceding trial, that he told his appointed counsel he had hired private counsel, refused to provide a name, and told appointed counsel "I'll tell you Monday morning. I'll tell the judge in the courtroom."

¶ 27 This court summarized the applicability of *McFadden* in *State v. Goodwin*:

> Under our reading of *McFadden*, when a trial court is faced with a Defendant's request to substitute his court-appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a disruption in the orderly process of justice. The most common example of a situation where a defendant's request is properly denied is where he seeks to weaponize his right to chosen counsel "for the purpose of obstructing and delaying his trial." *Id.* at 616, 234 S.E.2d at 747; *see also State v. Chavis*, 141 N.C. App. 553, 562, 540 S.E.2d 404, 411 (2000). In *Chavis*, for example, the trial court denied an indigent defendant's request for a private attorney, which he made on the morning of his trial. *Id.* We

> upheld the trial court's ruling, citing the timing of the request as the primary reason for our decision. *Id.*

State v. Goodwin, 267 N.C. App. 437, 440, 833 S.E.2d 379, 382 (2019). And, as discussed in *Goodwin*, the case at bar presents an example of when "a defendant's request is properly denied . . . ." *Id.* As the court in *Goodwin* discussed, this case is similar to *Chavis*, where Defendant waited until the last minute to attempt to substitute private counsel for his court appointed counsel. *See id.* (citing *Chavis*, 141 N.C. App. at 562, 540 S.E.2d at 411); *see also Chavis*, 141 N.C. App. at 562, 540 S.E.2d at 411 ("In this case, Defendant's motion was made on the morning the trial was set to begin on the basis Defendant wanted to employ private counsel. The private counsel Defendant indicated he wanted to employ was not in the courtroom at the time the motion was made and there was no evidence Defendant had made financial arrangements with this or any other private attorney."). Here, on the eve of trial, Defendant told his appointed counsel he was retaining private counsel but refused to tell him whom he planned to hire. On the day of trial, Defendant requested a continuance so he could be represented by Mr. Teddy, but Mr. Teddy was not present and had not filed a Notice of Appearance. Nor was there any evidence, other than Defendant's statement he "paid [Mr. Teddy] last week[,]" that Defendant "had made financial arrangements with [Mr. Teddy] . . . ." *See Chavis*, 141 N.C. App. at 562, 540 S.E.2d at 411. According to Mr. Teddy's response to Defendant, it appears Mr. Teddy

did not tell Defendant for certain he would represent Defendant in this matter. As argued by the State, it appears "retainment of services from the new counsel would be conditional upon getting a continuance." Mr. Teddy would only represent Defendant if a continuance was granted. For these reasons, the trial court properly denied Defendant's motion because "granting it would cause . . . a disruption in the orderly process of justice[,]" *Goodwin*, 267 N.C. App. at 440, 833 S.E.2d at 382, given that Defendant waited until the last minute to attempt to retain private counsel and make his motion to continue.

¶ 28 The trial court did not abuse its discretion in denying Defendant's motion to continue. We do not need to reach the prejudice prong of our standard of review. Defendant is not entitled to a new trial based upon denial of his motion to continue.

C. Defendant's Motion to Dismiss

1. Standard of Review

¶ 29 In ruling on a motion to dismiss:

> [T]he trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. If substantial evidence of each element is presented, the motion for dismissal is properly denied. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. It is immaterial whether the substantial evidence is circumstantial or direct, or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence

> does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury.

State v. Shelman, 159 N.C. App. 300, 304-05, 584 S.E.2d 88, 92 (2003) (alterations, citations, and quotations omitted). "Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it . . . ." *State v. James*, 248 N.C. App. 751, 755, 789 S.E.2d 543, 547 (2016) (quotation omitted).

> [T]he evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered.

State v. Southerland, 266 N.C. App. 217, 219-20, 832 S.E.2d 168, 170 (2019) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984)).

¶ 30 "We review the trial court's denial of a motion to dismiss *de novo*. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Walters*, 276 N.C. App. 267, 2021-NCCOA-72, ¶ 18 (quotation omitted).

2. Analysis

¶ 31 Defendant first argues the trial court erred in denying his motion to dismiss

because "the State failed to present substantial evidence that Defendant was appreciably impaired or, in the alternative, . . . the State failed to demonstrate that Defendant operated a motor vehicle after drinking a sufficient quantity of alcohol to become appreciably impaired." State argues it did present evidence sufficient to convict Defendant for driving while impaired. The trial court did not err by denying Defendant's motion, because the State presented substantial evidence that Defendant was appreciably impaired and that Defendant operated a motor vehicle after becoming impaired.

¶ 32 Defendant was convicted under North Carolina General Statute § 20-138.1:

> N.C. Gen. Stat. § 20-138.1(a) provides that
>
> [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; . . .

State v. Ingram, 2022-NCCOA-264, ¶12 (quoting N.C. Gen. Stat. § 20-138.1(a) (2017) (eff. Dec. 1, 2006)). "The essential elements of DWI are therefore: '(1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance.'" *State v.*

Eldred, 259 N.C. App. 345, 348, 815 S.E.2d 742, 744 (2018) (quotation omitted). Defendant does not challenge the sufficiency of the evidence he was "upon any highway, any street, or any public vehicular area within this State." *See id.* He only argues the State failed to show the first and third elements of DWI.

¶ 33 As to the first element, the State presented substantial evidence to show Defendant was "driving a vehicle." *See id.* "A person 'drives' within the meaning of the statute if he is 'in actual physical control of a vehicle which is in motion or which has the engine running.'" *Ingram*, ¶ 13 (quotation omitted). Here, Officer McCraw found Defendant behind the wheel of "a two-door hatchback-style Mustang in the side parking lot of the Village Pantry" with the engine running. While interacting with the Defendant, Defendant disengaged the parking brake, drove forward 10 to 15 feet, and then came to a stop. Defendant then turned the engine off and retained possession of the keys. The State presented substantial evidence to show Defendant was "driving a vehicle" within the meaning of the statute. *Id.* "[A] reasonable mind might accept [State's evidence] as adequate to support [the] conclusion[,]" *Shelman*, 159 N.C. App. at 304, 584 S.E.2d at 92 (quotation omitted), that Defendant was in "actual physical control of a vehicle which is in motion or which has the engine running." *Ingram*, ¶ 13.

¶ 34 As to the third element, Defendant's argument fails on two fronts. The State presented substantial evidence Defendant was "under the influence of an impairing

substance" both in the form of testimony from Officer McCraw and Officer Omondi regarding their opinions of Defendant's impairment based upon Defendant's appearance and actions as well as a chemical analysis. "[W]e have held that '[t]he opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol.'" *State v. Teesateskie*, 278 N.C. App. 779, 2021-NCCOA-409, ¶ 17 (quoting *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003)). Here, Officers McCraw and Omondi testified that, not only did Defendant strongly smell of alcohol, Defendant was also unsteady on his feet, unable to follow officer instructions, his eyes were red and glassy, he confused his cell phone for his identification, he was unable to operate his cell phone, when he finally was able to provide identification it took him 15 to 20 seconds to remove his identification from his wallet, he was unable to make eye contact with officers, and he was generally confused while talking to the officers. This evidence is sufficient to show Defendant was "under the influence of an impairing substance." *Eldred*, 259 N.C. App. at 348, 815 S.E.2d at 744 (quotation omitted).

¶ 35 The State also presented evidence of a chemical analysis showing Defendant's blood alcohol concentration exceeded 0.08 in violation of North Carolina General Statute § 20-138.1. *See* N.C. Gen. Stat. § 20-138.1(a)(2) (2016) ("The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol

concentration . . . ."); *State v. Hoque*, 269 N.C. App. 347, 354, 837 S.E.2d 464, 471 (2020) ("Additionally, a defendant's blood alcohol concentration or the presence of any other impairing substance in the defendant's body, as shown by a chemical analysis, and a defendant's refusal to submit to an intoxilyzer test are admissible as substantive evidence of impairment."). Defendant refused an intoxilyzer test, and Defendant's blood was drawn pursuant to a search warrant while he was in police custody. This sample was sent to the State Crime Lab, then forwarded to NMS Labs for analysis. The certifying scientist at the time Defendant's sample was tested, Ms. Sherwood, testified at trial the analysis conformed to standard procedures and the sample tested positive for ethanol at "143 milligrams per deciliter in whole blood[,]" which equates to a 0.14 BAC. The toxicology report showing Defendant's BAC was 0.14 at the time of the blood draw was also admitted into evidence. Viewed "in the light most favorable to the State," *Shelman*, 159 N.C. App. at 305, 584 S.E.2d at 92, the State presented substantial evidence to show Defendant did in fact operate the Mustang while "under the influence of an impairing substance." *Eldred*, 259 N.C. App. at 348, 815 S.E.2d at 744.

¶ 36 Because the State presented sufficient evidence to convict Defendant of DWI, the trial court did not err by denying Defendant's motion to dismiss.

IV. Conclusion

¶ 37 The trial court did not abuse its discretion in its rulings on the motions to

continue. Upon *de novo* review, the trial court did not err in denying Defendant's motion to dismiss as the State presented substantial evidence of each element of driving while impaired.

NO ERROR.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).