

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION III

CACR08-81

June 18, 2008

BILLY J. COLLINS

APPELLANT

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT
[CR-2007-72]

V.

HON. LANCE L. HANSHAW, JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant Billy Collins was convicted of driving while intoxicated by the District Court of Lonoke County. He appealed to the Lonoke County Circuit Court, where, after a de novo bench trial, he was again convicted. He brings this appeal, arguing that there was insufficient evidence supporting the conviction. We affirm.

Lonoke County Sheriff Deputy Randy Couch was dispatched on December 24, 2006, to a one-car motor-vehicle accident on Bowen Road. When Deputy Couch arrived on the scene at 9:40 p.m., he observed a green Chevrolet pick-up truck parked with its front and rear right tires in a ditch. Deputy Couch first drove by the vehicle and saw Collins inside sitting behind the steering wheel. The deputy testified that the vehicle was running and that he saw exhaust fumes. Deputy Couch asked Collins if he was okay, to which Collins answered "yes." Deputy Couch then pulled past Collins, parked the patrol vehicle, and

approached the driver's side door of the truck. The deputy asked Collins what had happened, and Collins stated that someone had run him off the road. Deputy Couch smelled alcohol and observed that Collins had bloodshot eyes. The deputy then asked Collins if he had been drinking, and Collins responded that he had consumed a couple of beers. The deputy asked Collins to exit the vehicle, at which time Collins turned off the truck and placed his keys in the pocket of his coat. Several field-sobriety tests were administered, which Collins failed. Deputy Couch placed Collins under arrest for suspicion of driving while intoxicated.

Deputy Couch transported Collins to the Carlisle Police Department to test his blood alcohol content using a BAC DataMaster machine. The results reflected that Collins's BAC was 0.15. Collins requested a second test, and the results were 0.16. Collins then advised that he wanted a third test, so the deputy transported Collins to Baptist Hospital in Little Rock. Deputy Couch testified that he did not see the results of the third test.

On cross examination, Deputy Couch testified that his report failed to mention that Collins's truck was running or that Collins placed his keys in his pocket. The deputy also testified that Collins's truck was stuck in the ditch and that he did not know what time the truck became stuck. Finally, the deputy testified that while it was possible that Collins's truck was not running, he believed it was.

After Deputy Couch's testimony, the State rested, at which time Collins moved for a directed verdict, arguing that the deputy's testimony showed that it was possible that the truck was not running, that the time the truck became stuck in the ditch was unknown, and that it was possible that Collins was just sitting in the truck. The trial court denied the motion.

Collins's first witness at trial was Elgie Hines, his girlfriend. She testified that on Christmas Eve 2006, around 6:00 or 6:30 p.m., she drove to Collins's home and on the way saw his truck in the ditch.¹ When she arrived at Collins's home, she found Collins in his garage. She gave him a kiss, and when she did so she failed to notice any alcohol on his breath.

Fay Lambert, Collins's brother, testified that on Christmas Eve 2006 he delivered a Christmas gift to Collins at his house around 6:00 p.m. On the way there, Lambert saw Collins's truck stuck in the ditch.

The parties stipulated to the testimony of Charles Hicks, Collins's uncle. Hicks's stipulated testimony was that he saw Collins at home on Christmas Eve 2006 between 6:00 and 6:30 p.m. and that Collins's truck was stuck in the ditch at that time.

Byron Coclosure also testified on behalf of Collins. Coclosure met Collins just a few days before trial. Coclosure's testimony was that he spent Christmas Eve at the house of his sister, who lived down the road from Collins. Around 6:00 p.m., Coclosure and his brother-in-law drove to the grocery store, and on the way, he observed the green truck parked on Bowen Road.

The final witness for the defense was Collins. He testified that he had been employed as a truck driver for twenty-four to twenty-five years and was very familiar with trucking laws

¹According to the record, Collins lived a couple of blocks from where his truck was located in the ditch.

and had served on various commissions created to make truck driving safer. He testified that he never drove after drinking alcohol.

According to Collins, on Christmas Eve 2006 between 5:00 to 5:30 p.m., his pick-up truck “got off the road just a little bit.” He testified that it was not an accident; rather, his truck was just stuck. He then left his truck, went home, and cooked a turkey. Somewhere between 8:00 and 9:00 p.m., he decided to go for a walk because he had diabetes and needed exercise. Before he left for his walk, within a thirty-minute period, he drank a couple of beers, some egg nog with vodka, and some cough medicine. After his walk, he decided to walk to his truck to retrieve his “remote.”² He entered the truck because it began to rain. When asked how long he had been sitting in his truck prior to the deputy’s arrival, Collins’s testimony varied. He first testified that he had only been sitting there for one minute prior to the deputy’s arrival, but later testified that he had been sitting in the truck for only ten seconds.

Collins testified that he told the deputy “what I was doing and what had happened.” Collins told the deputy that he had consumed some cough medicine around 8:35 p.m., after the truck had gotten stuck. Collins denied that his truck was running when the deputy approached it. Collins testified that his keys were in his pocket. He conceded that he took three blood-alcohol-content tests and that the results of the third test taken at Baptist were the same as the results from the two tests taken in Carlisle.

²Collins did not describe what kind of remote he was retrieving; however, Collins’s counsel, during the renewed motion for directed verdict, suggested the remote was the key fob for the vehicle.

Once the defense rested, Collins renewed his motion for directed verdict, arguing that there was a question as to whether the truck was running and whether Collins was driving. A long colloquy between the court and Collins's attorney followed, and thereafter, the trial court stated:

But the point is that the Court finds that the testimony is sufficient to find Mr. Collins guilty of DWI. It's unfortunate. I don't like doing that. I don't want to hurt anybody's livelihood.

But the fact is that the officer found him behind the wheel of the truck, had the keys at least in his hands, if not in the ignition, but he says the motor was running when he pulled up behind him. That puts him in physical control of the truck. He blew one five. An incident occurred of driving into the ditch, which is another evidence of -- whether somebody forced him off the road or not, you know -- I mean, that's -- a lot -- a lot of forcing off the road always happens after somebody has had two or three beers and some egg nog.

So, the Court finds Mr. Collins guilty of DWI... .

On appeal, Collins's sole argument is that there is insufficient evidence to support his DWI conviction. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Bohanan v. State*, 72 Ark. App. 422, 38 S.W.3d 902 (2001). Substantial evidence is evidence forceful enough to compel a conclusion with reasonable certainty without resorting to conjecture. *Id.* We review the evidence in the light most favorable to the State, considering only the evidence that tends to support the verdict. *Id.*

Arkansas Code Annotated section 5-65-103 (Repl. 2005) provides that it is unlawful and punishable for any person who is intoxicated to operate or be in actual control of a motor vehicle. The statute does not require law enforcement officers to actually witness an intoxicated person driving or exercising control of a vehicle. *Springston v. State*, 61 Ark. App.

36, 962 S.W.2d 836 (1998). The State may prove by circumstantial evidence that a person operated or was in actual physical control of the vehicle. *Id.*

Collins does not argue that there was insufficient evidence of his intoxication. Rather, he argues that there was insufficient proof that he was in actual control of his vehicle. He argues that the only evidence showing that he was in control of the vehicle was the deputy's testimony that Collins was behind the wheel of the truck. He submits that the deputy admitted that it was possible that the engine was not running and that the keys were not in the ignition.³

When viewing the evidence in the light most favorable to the State, considering only the evidence that tends to support the conviction, we hold that substantial evidence supports it. First, Deputy Couch testified that when he approached Collins, Collins was awake, sitting inside the truck behind the steering wheel. Deputy Couch testified that the engine was running and that he saw exhaust fumes coming from the rear of the truck. It was the deputy's testimony that when he asked Collins to exit the truck, Collins turned off the truck and placed the keys in his pocket. Finally, according to Deputy Couch, when he asked Collins what happened, Collins replied that someone had run him off the road.

We liken these facts to the facts in *Deshazier v. State*, 26 Ark. App. 193, 761 S.W.2d 952 (1998). There, a sheriff's officer responded to an accident. Upon arriving at the scene, the

³ Collins also argues on appeal that there was no evidence showing that the car was operable and that he was a menace to public safety. Because Collins did not make these arguments below, we cannot review them. *See Wallace v. State*, 53 Ark. App. 199, 920 S.W.2d 864 (1996) (holding that an appellant cannot change the grounds for an objection on appeal, but is bound by the scope and nature of the objections and arguments presented at trial).

officer found the defendant asleep, seated behind the steering wheel of his vehicle, which was in a ditch. The deputy knocked on the defendant's window, and the defendant immediately exited the vehicle. The officer noticed the odor of alcohol on the defendant and placed him under arrest for driving while intoxicated. The defendant was taken to the county jail, given a breathalyzer test, and registered 0.14. *Deshazier*, 26 Ark. App. at 194, 761 S.W.2d at 953.

At trial, the defendant admitted having driven his car into the ditch and having attempted to get it out. The defendant told the investigating officer that he had been run off the road and into the ditch by another driver. He testified that he began drinking after the accident because he was upset. The trial court chose not to believe his testimony and found him guilty of driving while intoxicated. *Id.* at 195, 761 S.W.2d at 953. On appeal, our court affirmed, citing to *Altes v. State*, 286 Ark. 94, 689 S.W.2d 541 (1985), stating that the trial court found the defendant's version of events to be false, and holding that there was substantial circumstantial evidence supporting the trial court's conviction. *Deshazier*, 26 Ark. App. at 195, 761 S.W.2d at 954.

In the case at bar and in *Deshazier*, a sheriff's officer found the defendants sitting behind the steering wheel of a motor vehicle. Both officers smelled alcohol. There was evidence in both cases that the defendants admitted having driven their vehicles into the ditch after someone ran them off the road. Both defendants failed alcohol tests, and both testified they began drinking after the accident.

These facts were sufficient to uphold the conviction in *Deshazier*, and likewise, are sufficient here. Moreover, we note that there are additional facts in the instant case that further support the conviction. For example, Collins was awake as he sat behind the steering

wheel. Also, the deputy testified that Collins's vehicle was running, that he saw exhaust fumes, and that when Collins exited the truck, he removed the keys from the ignition and placed them in his pocket.

In support of his position, Collins cites two cases, *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984), and *Rogers v. State*, 94 Ark. App. 47, 224 S.W.3d 564 (2006), which are distinguishable. In those cases, the defendants were asleep in their vehicles when the officers approached. Further, in *Dowell* and *Rogers*, the keys were not in the ignition.

Finally, while Collins did present his version of the story to the trial court, and it could have been true, the trial court simply did not believe it. A trial judge is not required to accept a criminal defendant's testimony, especially because an accused is the person most interested in the outcome of the trial. *Deshazier*, 26 Ark. App. at 195, 761 S.W.2d at 954. Therefore, we hold that substantial evidence supports Collins's DWI conviction.

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.