Cite as 2012 Ark. App. 640

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 12-428

LISA ANN FOSTER APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** November 7, 2012 APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. CR-11-243] HONORABLE BARBARA ELMORE, JUDGE AFFIRMED

DOUG MARTIN, Judge

Lisa Foster appeals from her misdemeanor conviction for driving while intoxicated, for which she was sentenced to sixty days in the Lonoke County jail and a $1000 fine. Her sole argument on appeal is that the evidence was insufficient to support her conviction. We find no error and affirm.

At trial, Arkansas State Police Corporal Charles Lewis testified that, at about 8:40 p.m. on July 9, 2010, he observed a vehicle driving on State Highway 5 with a defective headlight and either a broken windshield or broken headlight. Lewis turned on his blue lights, and the vehicle immediately pulled over to the right shoulder and stopped. Lewis approached the car and made contact with Foster, who was driving. As they talked, Lewis noticed a "very present" odor of alcohol. Foster told Lewis that she had had "a couple of beers," and when she got out of the car, she was very unsteady. Lewis noted that Foster was wearing flip-flops, which she said was the reason that she could not stand.

Lewis stated that Foster eventually walked to the front of the car but had to keep leaning on the car. Lewis gave Foster a portable-breath test, and while he was walking back to his patrol car, Foster nearly fell over. Lewis recalled that he grabbed her by the shoulders and steadied her, and then he placed her in his patrol car. Lewis explained to Foster that she was under arrest for suspicion of driving while intoxicated and that they were going to the Cabot Police Department to take a breath test. As Lewis and Foster continued talking, Foster again said she "had just had a couple of beers," although a few moments later, she also said that she had taken some medicine earlier in the day. Lewis asked if she had drunk beer since she had taken the medicine, and she said that she had.

Lewis testified that there was some unpaved or unfinished surface where he pulled Foster over, and she was so unsteady on her feet that he did not perform a field sobriety test because she was having difficulty standing, and he did not want to take the chance of her falling. Lewis noted that there were two hydrocodone pills in Foster's purse. After taking Foster to the police department in Cabot, Lewis administered a blood-alcohol-content test on Foster; the result of the test was a B.A.C. of .067.

On cross-examination, Lewis said that, after the breath test came in below .08, a urine test was also administered; however, Lewis said he never received a result from that test. Lewis said he did not have "proper conditions" at the scene of the stop to do a walk-and-turn; he also explained that he did not do a horizontal-gaze nystagmus test because Foster was so unsteady on her feet. Lewis recalled that, as he took Foster's background information, she said that she had just received news that her father had been hospitalized and was near death;

Foster was "visibly upset," Lewis said. Lewis also acknowledged that the odor of intoxicants that he smelled in the vehicle could have emanated from either Foster or her husband, who was visibly intoxicated.

After the circuit court denied her motion to dismiss, Foster called her mother, Erma Dean Price, who testified that she had been on the phone with Foster and had just told her that her father was dying. Foster also testified on her own behalf, saying that she had received the news about her father about thirty minutes before she was pulled over. She explained that she had gone to Cabot to pick up her husband, who does not drive, to bring him back to Mountain View. Foster said that her husband spilled a beer in the car, and while she had "a couple [of] beers earlier in the day . . . about lunchtime," she asserted that she did not take any medication that day. The pills in her purse, she explained, were her father's medication that "accidentally" ended up in her purse.

Foster said that she was upset when her mother called to tell her about her father, and when she got pulled over, her distress became worse. She explained that, because she had parked on an incline, she had to hold the heavy car door open. She said that when she got out of the car, she was trying to hold the door open and slipped on the gravel in her flip-flops. Foster claimed that she "wasn't drunk, [she] was just upset and scared."

On cross-examination, Foster stated that she "had a beer at noon that day, with [her] lunch." She emphasized that she "had one that entire day." She reiterated that her husband had spilled a beer in the car, and she denied that she fell, although she said it was "possible" that Lewis had to hold onto her.

At the conclusion of the trial, Foster renewed her motion to dismiss, but the circuit court again denied it, finding credible Lewis's testimony that Foster had told him that she took medication and then drank the beers. The court's sentencing order was entered on January 23, 2012, and Foster filed a timely notice of appeal on February 22, 2012.

As noted above, Foster's sole argument on appeal is that there was insufficient evidence to support her DWI conviction. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Morton v. State*, 2011 Ark. App. 432, ___ S.W.3d ___. Substantial evidence is evidence forceful enough to compel a conclusion with reasonable certainty, without resort to conjecture. *Breedlove v. State*, 62 Ark. App. 219, 970 S.W.2d 313 (1998). We review the evidence in the light most favorable to the State, considering only the evidence that tends to support the verdict. *Jenkins v. State*, 60 Ark. App. 1, 959 S.W.2d 57 (1997).

Arkansas Code Annotated section 5-65-103(a) (Repl. 2005) provides that it is unlawful for any person who is intoxicated to operate or be in actual physical control of a motor vehicle. "Intoxicated" means

> influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury to himself and other motorists or pedestrians.

Ark. Code Ann. § 5-65-102(2) (Repl. 2005).

On appeal, Foster argues that the evidence was insufficient to prove that she was driving while intoxicated. She notes that her blood-alcohol content, as measured by the

breath test, was less than the presumptive illegal amount provided by Arkansas Code Annotated section 5-65-103(b) (Repl. 2005);[1] there was evidence that she was distraught; and Lewis acknowledged that she was wearing flip-flops on uneven ground, which could have contributed to her unsteadiness on her feet. Thus, Foster urges, the evidence was insufficient to compel a conclusion beyond suspicion and conjecture.

We find no merit to Foster's argument. Proof of blood-alcohol content is not necessary to sustain a DWI conviction. *Porter v. State*, 356 Ark. 17, 22, 145 S.W.3d 376, 379 (2004); *Blair v. State*, 103 Ark. App. 322, 327, 288 S.W.3d 713, 717 (2008). Such proof, however, is admissible as evidence tending to prove intoxication. *Porter*, 356 Ark. at 22, 145 S.W.3d at 379. The observations of police officers with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI charge. *Blair*, 103 Ark. App. at 327, 288 S.W.3d at 717. Moreover, variances and discrepancies in the proof go to the weight or credibility of the evidence, and it is for the fact-finder to resolve any conflicts and inconsistencies. *Porter*, 356 Ark. at 24, 145 S.W.3d at 380. Finally, the judge is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Ellis v. State*, 2011 Ark. App. 654; *see also Barrera v. State*, 2012 Ark. App. 533 (the fact-finder is not required to believe the self-serving testimony of the defendant).

[1]This subsection provides that it is "unlawful . . . for any person to operate or be in actual physical control of a motor vehicle if at that time the alcohol concentration in the person's breath or blood was eight-hundredths (.08) or more[.]"

In the instant case, the circuit court made a specific finding that Lewis was more credible than Foster. Foster's various explanations and changing testimony (on direct examination, she said she had "a couple of beers," but on cross, she said she only had one) likely diminished her credibility in the eyes of the judge, who was, of course, not required to believe her. Lewis offered credible testimony that there was a noticeable odor of alcohol in the car, that Foster was so unsteady on her feet that he was afraid to conduct field-sobriety tests for fear of her falling, and that she told him that she had consumed two beers after taking medication. On this evidence, we cannot say that the circuit court had to resort to speculation and conjecture to conclude that Foster was guilty of driving while intoxicated.

Affirmed.

PITTMAN and ABRAMSON, JJ., agree.

Robert M. "Robby" Golden, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.