NO. COA01-901

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Iredell County
No. 99 CRS 18046

ADRIAN LEE JOHNSON

Appeal by defendant from judgment dated 4 April 2001 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 26 March 2002.

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

Patricia L. Riddick for defendant-appellant.

GREENE, Judge.

Adrian Lee Johnson (Defendant) appeals a judgment dated 4 April 2000 entered consistent with a jury verdict finding him guilty of driving while impaired.

At trial, the State presented evidence that on the night of 8 October 1999, Kimball Meyer (Meyer) of the Iredell County EMS observed a pickup truck weaving erratically "from one side of the road to the other" while heading north on Highway 21 toward Harmony. Meyer radioed for a highway patrol trooper or sheriff's deputy in the area. Once in Harmony, the pickup truck turned left

on Highway 901 and "accelerated at a great rate of speed" down a hill and out of Meyer's field of vision. As Meyer came down the hill, he saw the pickup truck as it ran off the road and then veered back into the oncoming lane of traffic before righting itself. Meyer followed the pickup truck approximately four miles on Highway 901, at which point the pickup truck pulled into a Texaco gas station (the Texaco). Meyer parked his ambulance at a hardware store across the street from the Texaco and waited for a law-enforcement officer to arrive. He saw Defendant exit the pickup truck and walk into the Texaco. Soon thereafter, State Highway Patrol Trooper Charles Michael Tedder (Tedder) arrived at the scene.

After speaking with Meyer, Tedder pulled his patrol vehicle next to Defendant's truck and observed a large beer bottle inside the truck on the floorboard. Tedder met Defendant on his way out of the Texaco and described his impressions of Defendant as follows:

> [I]t was obvious that he was impaired, in my opinion. His face was flushed, eyes were bloodshot. He was not falling down, so to speak, but his, he was having a difficult time walking and maintaining his balance.
>
> He also had a cigar in his hand. . . . He was trying to take the wrapper off of the cigar. . . . He was fumbling with the wrapper and appeared to have a complete loss of his manual dexterity of his fingers.

Tedder asked Defendant, who "sway[ed] back and forth as he walked toward[]" the patrol vehicle, if he could speak with him. Defendant leaned against Tedder's patrol vehicle, as if to maintain

his balance. When Tedder asked Defendant to get off of his patrol vehicle, Defendant stood up but swayed noticeably.

Once Defendant confirmed he owned the pickup truck and had been traveling alone, Tedder arrested and handcuffed him. Tedder then retrieved the cold, half-empty, forty-ounce bottle of beer from Defendant's truck. In his police report, Tedder noted a "strong" odor of alcohol on Defendant's breath. Defendant's speech was slurred, mumbled, and confused and appeared to have trouble understanding what Tedder said. Despite being repeatedly informed he was under arrest for driving while impaired, Defendant continuously asked Tedder why he was being arrested. In between brief intervals of cooperation, Defendant violently kicked the front console of the patrol vehicle, threatened and cursed Tedder, cried, and threatened to commit suicide if his handcuffs were removed. He refused on three occasions to submit to an intoxilyzer breath analysis. Having observed Defendant over a three-hour period, Tedder formed an opinion that Defendant "had consumed a sufficient amount of impairing substance so as to appreciably impair his mental [or] physical faculties."

At trial, Defendant moved to dismiss the charge at the conclusion of the State's evidence. The trial court denied the motion. Defendant offered no evidence but renewed his motion to dismiss, which was again denied.

The dispositive issue is whether the State presented substantial evidence Defendant drove a vehicle on a public highway

while his physical or mental faculties were "appreciably impaired."

A motion to dismiss must be denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that [the] defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

Under N.C. Gen. Stat. § 20-138.1, a person commits the offense of impaired driving if he drives a vehicle on a highway, a street, or any other public vehicular area "[w]hile under the influence of an impairing substance," N.C.G.S. § 20-138.1(a)(1) (1999), or "[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more," N.C.G.S. § 20-138.1(a)(2) (1999). In order to prove a defendant is impaired within the meaning of section 20-138.1(a)(1),

> the consumption of alcohol, standing alone, does not render a person impaired. An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired. Nor does the fact that [the] defendant smells of alcohol by itself control. On the other hand, the State need not show that the defendant is "drunk," i.e., that his or her faculties are *materially* impaired. The effect must be appreciable, that is, sufficient to be

> recognized and estimated, for a proper finding that the defendant was impaired.

State v. Harrington, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985) (citations omitted). The fact, however, that "a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties," is sufficient to show a violation of section 20-138.1(a)(1). *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965).

In this case, viewing the evidence in the light most favorable to the State, Defendant was seen driving erratically over a span of several miles. When taken into custody, Defendant had a cold, half-empty bottle of beer in his truck and he smelled of alcohol. Tedder observed that Defendant's eyes were bloodshot and that his speech, balance, and coordination were poor. Defendant also exhibited rapid, extreme mood swings and an inability to understand or remember what he was told. In addition, he refused to submit to the intoxilyzer test. Finally, Tedder formed an opinion that Defendant was obviously and substantially impaired. Such evidence was more than sufficient to go to the jury. *See State v. O'Rourke* 114 N.C. App. 435, 441, 442 S.E.2d 137, 140 (1994); *see also State v. Beasley*, 104 N.C. App. 529, 533, 410 S.E.2d 236, 239 (1991). Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charge against him.[1]

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[1]We note that Defendant argues the State failed to present any evidence he had consumed alcohol or any other impairing substance.

No error.[2]

Judges HUDSON and TYSON concur.

Report per Rule 30(e).

There is no requirement that the State offer into evidence proof of the precise "impairing substance." *See* N.C.G.S. § 20-138.1(a)(1). The State adduced substantial circumstantial evidence of Defendant's consumption of alcohol and its impairing effect on him.

[2]We do not address Defendant's remaining assignments of error as he has abandoned them by his failure to address those assignments of error in his brief to this Court. N.C.R. App. P. 28(a).