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NO. COA02-1700

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STATE OF NORTH CAROLINA

v. | Craven County Nos. 01CRS053738 01CRS053742-44

LARRY WAYNE WRIGHT

Appeal by defendant from judgments entered 31 July 2002 by Judge James E. Ragan, III in Craven County Superior Court. Heard in the Court of Appeals 27 October 2003.

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

*Penny K. Bell and Mark A. Key for defendant-appellant.*

HUNTER, Judge.

Larry Wayne Wright ("defendant") appeals judgments based upon jury verdicts convicting him of several offenses regarding the illegal operation of a motor vehicle. For the reasons stated herein, we conclude the trial court did not err.

On 12 July 2001, defendant was charged with driving while license revoked, driving while impaired, possessing an open alcohol container in a vehicle passenger area, and hit and run with property damage. He was convicted in Craven County District Court and Craven County Superior Court. At trial the following evidence was offered.

Judith Morris ("Morris") was visiting the home of her sister, Imogene McLawhorn ("McLawhorn"), when she heard a loud noise coming from the front yard at approximately 7:10 p.m. Morris, McLawhorn, and their cousin, Carolyn Patterson ("Patterson"), hurried out of the house to find Morris' pewter-colored Dodge Intrepid ("Intrepid"), which was parked in the front of McLawhorn's home, had been hit by a white Buick Regal ("Regal"). Defendant, an acquaintance of Morris whose father lived across the street from McLawhorn, was sitting in the Regal with the engine running. As Morris and McLawhorn approached defendant, he exited the Regal, indicated he had insurance, and walked away. Morris testified that defendant had a strong order of alcohol on his breath, had slurred speech, and weaved as he walked across the street and around the back of his father's house. Patterson also testified that "[w]hat little [defendant] said sounded slurred. He was staggering. It did not look like [he was in] a sober condition."

Sergeant Mickey Tilghman ("Sergeant Tilghman") and Officer Jason Buck ("Officer Buck") arrived at the accident scene at approximately 7:25 p.m. Sergeant Tilghman observed several empty containers of beer in the passenger area of the Regal. He also found a partially consumed beer in the driver's area of the vehicle that was "cool to the touch." Following the collection of witness statements, the officers went in search of defendant at approximately 9:15 p.m.

At approximately 10:30 p.m., the officers located defendant walking on the shoulder of a road approximately five miles from the

accident scene. Sergeant Tilghman testified, over defendant's objection, that upon approaching defendant Sergeant Tilghman was of the opinion that "defendant had consumed a sufficient amount of impairing substance to appreciably impair his mental faculties[]" based on the manner in which defendant was walking and the odor of alcohol coming from his person. Officer Buck also testified, over defendant's objection, that he was of the opinion that defendant's slurred speech, odor, and mannerisms suggested "[h]e had consumed an intoxicating substance." Defendant was subsequently placed under arrest and transported to the Craven County Sheriff's Office.

At the Sheriff's Office, Highway Patrol Trooper Victor Lee ("Trooper Lee") asked defendant to submit to an Intoxilyzer test and/or field sobriety tests. Defendant refused. Trooper Lee testified, over defendant's objection, that during his time with defendant he formed the opinion that "defendant had consumed a sufficient amount of alcohol so as to appreciably impair both his mental and physical faculties[]" based on his slurred speech and the odor of alcohol on his breath.

After the State rested, defendant moved to dismiss all the charges against him. Following the denial of that motion, defendant testified on his own behalf. According to his testimony, defendant was at his father's house on 12 July 2001 attempting to let his father listen to a noise the Regal was making. He testified as follows:

> I reached in [the Regal], put it in gear, pulled the gear shift down to drive, standing halfway in the car, halfway out, mashed the accelerator, [and it] wouldn't move. Mashed

> it a little harder and when I did, the accelerator hung, spinned off, pushed me out of the door and I started chasing out of the car across the street . . . [and] when it hit the curbing, it detoured and hit the lady's car across the street.
>
> . . . .
>
> [W]hen [the Regal] got over there and hit [Morris'] car, I got in the [Regal], mashed the brake and put it in park. As I was getting out, the ladies was coming up from behind the fence.

Defendant further testified that the alcohol found in the Regal belonged to a friend of his who had driven the vehicle earlier that morning. Finally, defendant testified that he had not consumed any alcoholic beverages prior to the accident, but had consumed a substantial amount of beer thereafter.

I.

Defendant argues the trial court committed prejudicial error by allowing Sergeant Tilghman, Officer Buck, and Trooper Lee to testify regarding his intoxication several hours after the accident. We disagree.

"A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2001). The defendant has the burden of showing he was prejudiced by the admission of the evidence. *Id.* The admittance of prejudicial evidence results in the defendant receiving a new trial. *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983).

In the case *sub judice*, defendant takes issue with the admissibility of the testimony of the officers regarding his intoxication after the accident.

> Where intoxication is an issue at the trial, the question whether the existence of intoxication at a particular time is competent to show the existence of that condition at another time is a question of materiality or remoteness to be determined upon the facts of each particular case, including the length of time intervening and the showing, if any, whether the condition remained unchanged.

*State v. Davis*, 265 N.C. 720, 722, 145 S.E.2d 7, 9 (1965) (citations omitted). All three officers opined that defendant was impaired by alcohol when they observed him approximately three and a half hours after the accident. Defendant contends that the period of time between the accident and his arrest raises "a question of materiality or remoteness." Defendant essentially supports his contention by analogizing his case to *Davis*.

In *Davis*, the defendant objected to testimony that he was staggering on the street in front of the home of a woman he allegedly raped three and a half hours earlier. The *Davis* Court stated that "[i]n order to determine the relevance and competency of the testimony in question, it must be considered in relation to other evidence on the subject and to the conduct of defendant." *Id*. The *Davis* Court subsequently concluded that the testimony had "no tendency to prove that defendant was intoxicated at the time of the alleged crime, and [wa]s not competent for such purpose[]" because (1) the victim stated that the defendant "did not 'act like a drunk person'" and (2) the State never argued that the defendant

was intoxicated at the time of the offense. *Id*. at 722-23, 145 S.E.2d at 9-10. Nevertheless, the *Davis* Court also concluded that the testimony was relevant and competent "as bearing upon [the defendant's] mental state and motive in appearing at the home of the [victim]" because "a guilty person, in full possession of his faculties, does not ordinarily put himself in a position to be readily identified as the assailant and to be readily apprehended." *Id*. at 723, 145 S.E.2d at 10.

Defendant contends that like *Davis*, testimony tending to prove his intoxication approximately three and a half hours after the accident was not competent for that purpose. However, unlike in *Davis*, there was "other evidence on the subject and to the conduct of defendant" in the present case relevant and competent to the officers' testimonies. Evidence as to defendant's conduct at the accident scene was offered through the testimony of Morris and Patterson. Although neither witness specifically opined that defendant was under the influence of an intoxicating substance at the time of the accident, their combined testimony established that defendant smelled of alcohol, had slurred speech, staggered as he walked, and did not appear to be in a "sober condition" when he exited the Regal. Furthermore, other evidence established that upon arriving at the scene of the accident, Sergeant Tilghman found several empty cans of beer in the Regal, as well as one partially consumed beer in the driver's area that was "cool to the touch."

We note that defendant put forth evidence that the officers' opinions as to his intoxication at the time they located him was

due to defendant consuming a substantial amount of beer after the accident. However, the credibility of a witness is a jury question. *See State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981). The jury was allowed to consider all the evidence and determine whether defendant was intoxicated as a result of alcohol consumed immediately preceding the accident or sometime thereafter.

Accordingly, based on the facts in this case, defendant was not prejudiced by the admission of the officers' testimonies because they were relevant and competent to other evidence offered as to defendant's impairment at the time of the accident.

II.

Defendant also argues the court erred in denying his motion to dismiss all the charges against him. In order to survive a motion to dismiss in a criminal action, the trial court must view the evidence in the light most favorable to the State, drawing every reasonable inference in favor of the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The evidence considered must be "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether the evidence presented is substantial is a question of law for the court. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). "[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) (citations omitted).

A. Driving While License Revoked

Defendant contends there was insufficient evidence to support his conviction for driving while licensed revoked. N.C. Gen. Stat. § 20-28(a) (2001) prevents "any person whose drivers license has been revoked [from] driv[ing] any motor vehicle upon the highways of the State while the license is revoked[.]" Defendant only asserts there was no evidence that he was driving the Regal or that the vehicle was being driven on a vehicular highway. We disagree.

In *State v. Mabe*, 85 N.C. App. 500, 504, 355 S.E.2d 186, 188 (1987), this Court recognized "that one 'drives' a motor vehicle . . . 'if he is in actual physical control of a vehicle which is in motion or which has the engine running.'" (Citation omitted.) Defendant's own testimony provided sufficient evidence that he was in "actual physical control" of the Regal when he "cranked the car up," "put it in gear, pulled the gear shift down to drive," "mashed the accelerator," and then "mashed the brake and put [the car] in park[]" after it hit Morris' Intrepid. Moreover, since Morris' Intrepid was parked across the street when the Regal hit it, there was substantial evidence that the Regal was driven on a vehicular highway even if only for a short period of time. Thus, defendant's contention is without merit.

B. Driving While Impaired

Having concluded there was sufficient evidence that defendant was driving the Regal, we now address defendant's contention that there was insufficient evidence that he was driving while impaired.

N.C. Gen. Stat. § 20-138.1(a) (2001) provides:

> 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.

Further, our Supreme Court has held that "'the "fact that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [N.C.G.S. §] 20-138."'" *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000) (citation omitted). Evidence that defendant, whose breath had the odor of alcohol, hit Morris' Intrepid while it was parked across the street in her sister's yard was sufficient to establish *prima facie*, a violation of the statute. Thus, defendant's motion to dismiss the charge of driving while impaired was properly denied.

C. Open Alcohol Container in Vehicle Passenger Area

Next, defendant contends there was insufficient evidence to support his conviction for possession of an open container of alcohol in the passenger area of a vehicle.

N.C. Gen. Stat. § 20-138.7(a) (2001) provides:

> No person shall drive a motor vehicle on a highway or the right-of-way of a highway:
>
> (1) While there is an alcoholic beverage in the passenger area in other than the unopened manufacturer's original container; and
>
> (2) While the driver is consuming alcohol or while alcohol remains in the driver's body.

With respect to the second element of this statute, we previously determined there was sufficient evidence that defendant was driving while impaired by alcohol. Therefore, additional evidence offered at trial that a partially consumed beer was found in the driver's area of the Regal following defendant's exit from that vehicle provided sufficient evidence to support the first element. Thus, the court did not err in denying defendant's motion to dismiss this charge.

D. Hit and Run

Finally, defendant contends there was insufficient evidence to support a conviction for hit and run with property damage. N.C. Gen. Stat. § 20-166 provides, *inter alia*:

> The driver of any vehicle, when he knows or reasonably should know that the vehicle which he is operating is involved in an accident or collision, which accident or collision, results:
>
> (1) Only in damage to property; or
>
> (2) In injury or death to any person, but only if the operator of the vehicle did not know and did not have reason to know of the death or injury;
>
> shall immediately stop his vehicle at the scene of the accident or collision.

N.C. Gen. Stat. § 20-166(c) (2001). Defendant asserts that since he was an acquaintance of Morris', his leaving the accident scene should not have been considered "running" for purposes of the statute because Morris' knew who he was and where his father lived. We disagree.

It is undisputed that following the accident, which resulted in damage to Morris' Intrepid, defendant immediately left the scene. As further prohibited by N.C. Gen. Stat. § 20-166, a driver may not leave the accident scene without first giving his "name, address, driver's license number and the license plate number of his vehicle to . . . any person whose property [wa]s damaged in the accident or collision." N.C. Gen. Stat. § 20-166(c1). Despite his association with Morris, defendant's absence from the scene was still a direct violation of this subsection because he left without providing any of the required information to Morris. Therefore, defendant's motion to dismiss the charge of hit and run with property damage was properly denied.

In conclusion, defendant was not prejudiced by the admission of the officers' testimony regarding his intoxication after the accident. Also, there was sufficient evidence offered at trial to support the court's denial of defendant's motion to dismiss the charges against him.

No error.

Chief Judge EAGLES and Judge GEER concur.

Report per Rule 30(e).