NO. COA08-173

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v. Wilson County
No. 06 CRS 53209

HUGH BOLDEN JOHNSTON, IV

Appeal by Defendant from judgment entered 16 May 2007 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 21 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for Defendant.

STEPHENS, Judge.

On 11 September 2006, a grand jury indicted Defendant for habitual impaired driving. *See* N.C. Gen. Stat. § 20-138.5(a) (2005) ("A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense."). The indictment stated that on 7 June 2006, Defendant unlawfully and willfully drove a vehicle "on the public vehicular area of Forest Hills Road, Wilson, North Carolina while subject to an impairing substance[,]" and that Defendant had been

convicted of driving while impaired three or more times within seven years of the date of the alleged offense. At a jury trial conducted 16 May 2007, Defendant stipulated to the prior convictions, and the jury convicted Defendant of driving while impaired. *See* N.C. Gen. Stat. § 15A-928(c)(1) (2005) ("If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense."). The trial court sentenced Defendant to 19 to 23 months in prison. Defendant gave notice of appeal in open court. On appeal, Defendant contends the trial court should have dismissed the case at the close of all the evidence due to (1) insufficiency of the evidence, and (2) a fatal variance between the allegations in the indictment and the evidence offered at trial.

Facts

Trooper Jason Edwards of the North Carolina Highway Patrol ("Officer Edwards") testified that on 7 June 2006 he was employed by the Wilson Police Department and that he responded to a complaint of loud music coming from a vehicle located in a parking lot behind a doctor's office located at 2115 Forest Hills Road. Upon investigating, he observed Defendant sitting in the driver's seat of a vehicle listening to loud music. Officer Edwards approached the vehicle and saw Defendant "switch the vehicle off" and place the keys in his pocket. Officer Edwards asked Defendant

to exit the vehicle. Defendant appeared unstable as he exited. Defendant's speech was slurred, his eyes were red and glassy, and Defendant had a strong odor of alcohol. Officer Edwards saw open beers in the vehicle's center console and an open box of Busch beer in the back seat. Defendant told Officer Edwards that he had been sitting in the vehicle listening to music and drinking a few beers. Defendant's girlfriend, Ms. Nelson, emerged from the doctor's office and told Officer Edwards that she drove the vehicle to the doctor's office for an appointment and that there was no beer in the vehicle when they arrived. Officer Edwards arrested Defendant for driving while impaired. Defendant later failed a sobriety test and refused to take an intoxilyzer test.

Officer Rudolfo Salazar of the Wilson Police Department testified that on 7 June 2006 he also responded to the complaint of loud music. Officer Edwards was arresting Defendant as Officer Salazar arrived. Based on Defendant's physical appearance and odor, Officer Salazar formed the opinion that Defendant was impaired.

At the conclusion of the State's evidence, the transcript reveals that the following exchange took place:

> [DEFENSE COUNSEL]: Hear our motion?
>
> THE COURT: Do you want to come to the bench?
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> [DEFENSE COUNSEL]: That would be fine.
>
> (Discussion at the bench off the record.)
>
> (The following proceedings were on the record but out of the hearing of the jury):

> THE COURT: The motion from the Defendant for a dismissal that the evidence being contrary to the light most favorable to the State, that motion is denied.

Defendant's sole witness, Ms. Nelson, testified that she drove her vehicle to the doctor's office that day and that Defendant accompanied her in the car. Before entering the office, Ms. Nelson told Defendant that he could turn on the car's air conditioner while he waited, but instructed him to turn the engine on and off so that it would not overheat. Ms. Nelson informed Officer Edwards that she bought the beer found in the vehicle and that the car had not moved while she was attending her appointment.

At the conclusion of all the evidence, the following exchange took place:

> THE COURT: Let the record reflect the jury is out of the hearing of the Court. The charge conference will convene.
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> Before the charge conference you want to put it on the record, [defense counsel]?
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> [DEFENSE COUNSEL]: Yes, Your Honor. We would renew our motion to dismiss at the end of all the evidence. There's insufficient evidence that certainly at this point after we pass the point where evidence must be taken in the light most favorable to the State considering all the evidence there's insufficient evidence that [Defendant] violated the driving while impaired statute and that the case should be dismissed.
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> THE COURT: It's my understanding from Officer Edwards that upon arriving at the address in the parking lot in that public vehicular area the motor to this automobile was running. [Defendant] was under the wheel. He testified that he observed [Defendant] cut the car off and put the keys in his pocket. I believe that that testimony satisfies the case law that the vehicle was being operated. Do you disagree with that?

> [DEFENSE COUNSEL]: Your Honor, I would disagree that it does comply with the indictment and the warrant which specifically state that on that occasion not only did he drive the vehicle but he drove it on the public vehicular area of Forest Hills Road, Wilson, North Carolina.
>
> Now the public vehicular area of Forest Hills Road is the road itself and certainly there's been no evidence that he was on Forest Hills Road at any time operating a vehicle.
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> THE COURT: Well --
>
> [DEFENSE COUNSEL]: We would contend that is a fatal variance.
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> THE COURT: The business is on Forest Hills Road. The rebuttal testimony is that, your testimony was that the Busch beer was bought before they got there. The rebuttal testimony was from the officer that there was no beer there beforehand, thus the inference would be that if Miss Nelson drove the car there, there was no beer in the automobile, then [Defendant] had to drive on the public vehicular area of Forest Hills Road in order to ascertain, thus that's a factual question for the jury.
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> [DEFENSE COUNSEL]: If Your Honor pleases, that's a classic case of implying an inference upon an inference. [Defendant] is in the car with the engine running, therefore, he operated the vehicle. You're implying another inference on top of that, not only did he operate but went and got beer with it. Surely there's many ways that a person could go and get beer, on foot or otherwise, in an hour or so that they're outside the place and it is equally inferential that that happened. The inference doesn't give rise to sufficient amount of evidence we would contend that the jury would decide.

The trial court then denied Defendant's motion.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the trial court erred in denying his motion to dismiss on the ground that there was insufficient evidence that he "operated" a vehicle while impaired.

When a defendant moves to dismiss based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence (1) of each element of the crime charged, and (2) that the defendant is the perpetrator. *State v. Scott*, 356 N.C. 591, 573 S.E.2d 866 (2002). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (citations omitted). "The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citation omitted). If the evidence, when considered in light of the foregoing principles, is sufficient only to raise a suspicion as to either the commission of the crime or that the defendant on trial committed it, the motion to dismiss must be allowed. *Scott*, 356 N.C. 591, 573 S.E.2d 866.

The elements of the offense of driving while impaired are that the defendant (1) was driving a vehicle; (2) upon any highway, street, or public vehicular area within this state; (3) while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1(a)(1) (2005). "[O]ne 'drives' within the meaning of G.S. 20-138.1 if he is in actual physical control of a vehicle which is in motion or which has the engine running." *State v. Fields*, 77

N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). "The terms 'driver' and 'operator' and their cognates are synonymous." N.C. Gen. Stat. § 20-4.01(7) (2005).

Defendant does not contend that there was insufficient evidence that he was impaired or that the parking lot constituted a public vehicular area within this state. Defendant argues, however, that there was insufficient evidence that he was driving the vehicle. Specifically, Defendant contends: (1) that there was insufficient evidence that he was in actual physical control of the vehicle while it was in motion, and (2) while Officer Edwards's testimony that he observed Defendant "switch the vehicle off" tends to show "that the battery power to the vehicle was on to allow Defendant to listen to music, without more, it is not at all sufficient to imply that the 'engine' was 'running[.]'"

1.

We agree with Defendant that there was insufficient evidence that he was in actual physical control of the vehicle while it was in motion. Officer Edwards's testimony that Ms. Nelson said there was no beer in the vehicle when she drove to the doctor's office and that he observed beer in the vehicle only raises a suspicion that Defendant drove the vehicle to purchase beer. As defense counsel argued below, there are many other ways by which Defendant could have obtained a box of Busch beer. The State presented no other evidence that Defendant operated the vehicle while it was in motion, and the evidence which was presented was insufficient to show that Defendant operated the vehicle while it was in motion.

2.

Defendant did not argue to the trial court, as he does to this Court, that there was insufficient evidence that he was in control of the vehicle while the engine was running. Below, Defendant only argued that there was insufficient evidence that he was operating the vehicle while it was in motion and that there was a fatal variance between the indictment and the State's evidence at trial. In fact, the trial court specifically asked defense counsel whether Officer Edwards's testimony that he observed Defendant "switch the vehicle off" tended to show "that upon arriving at the address in the parking lot in that public vehicular area the motor to this automobile was running." Defense counsel did not disagree with the trial court. "[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount . . . .'" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Because Defendant did not present this argument to the trial court, this issue is not properly before this Court.

Even assuming *arguendo*, however, that Defendant presented this argument to the trial court, we conclude that Officer Edwards's testimony, when viewed in the light most favorable to the State, constitutes substantial evidence that Defendant was in control of the vehicle while the engine was running. Again, Officer Edwards testified that he saw Defendant "switch the vehicle off[.]" From this evidence, it is reasonable to infer that Defendant turned off

the vehicle's engine. Accordingly, there was substantial evidence of each element of driving while impaired and that Defendant was the perpetrator. The trial court properly denied Defendant's motion to dismiss for insufficient evidence.

II. FATAL VARIANCE

Defendant next argues that the trial court erred in failing to dismiss the charge where there was a fatal variance between the allegations of the indictment and the evidence at trial. The indictment states: "[D]efendant . . . unlawfully, willfully did drive a vehicle on the public vehicular area of Forest Hills Road, Wilson, North Carolina while subject to an impairing substance." Defendant argues that there was insufficient evidence presented at trial that he operated a vehicle on the public vehicular area of Forest Hills Road, and that the failure to present such evidence constitutes a fatal variance requiring dismissal.

This Court has held that

> [a]n indictment must set forth each of the essential elements of the offense. Allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment. To require dismissal, any variance must be material and substantial and involve an essential element.

State v. Pelham, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203 (citations omitted), *appeal dismissed and disc. review denied*, 359 N.C. 195, 608 S.E.2d 63 (2004). "It is only where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal." *State v. Poole*, 154 N.C. App.

419, 423, 572 S.E.2d 433, 436 (2002) (quotation marks and citation omitted), *cert. denied*, 356 N.C. 689, 578 S.E.2d 589 (2003).

The indictment contains the three required elements of driving while impaired, as it alleges that Defendant "did drive a vehicle on . . . [a] public vehicular area . . . while subject to an impairing substance." The specific public vehicular area on which Defendant drove while impaired is not material to the offense, as long as it is proven by the evidence that Defendant did drive or operate a vehicle, while impaired, on a public vehicular area within this state. The specific name and location of the public vehicular area are beyond the essential elements of the offense and may be treated as surplusage and disregarded when testing the sufficiency of this indictment. *Pelham*, *supra*.

Moreover, it is not contested that the parking lot of the doctor's office constituted a "public vehicular area" within this state and that the doctor's office was located on Forest Hills Road. The evidence did not tend to show the commission of an offense not charged in the indictment, and as a result, there is no fatal variance requiring dismissal. As there existed substantial evidence to support the essential elements of the offense set forth in the indictment, the trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).