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NO. COA09-1689

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

STATE OF NORTH CAROLINA

v. Buncombe County
No. 08 CRS 19439

DONALD PERRY HENSLEY, JR.,
Defendant.

Appeal by defendant from judgments entered 25 August 2009 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 17 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

HUNTER, Robert C., Judge.

Donald Perry Hensley, Jr. ("defendant") appeals from convictions of driving while impaired and reckless driving to endanger. Defendant argues on appeal that the trial court erred in denying his motion to dismiss both charges. After careful review, we find no error.

Background

On 14 February 2008, at approximately 4:13 p.m., Trooper Greg Reynolds ("Trooper Reynolds") responded to a single vehicle accident involving a moped on New Rockland Road in Buncombe County, North Carolina. Upon arriving at the scene of the accident,

Trooper Reynolds saw defendant lying on the road bleeding from his head with abrasions on the left side of his body. The moped was damaged on its left side as well. At the scene of the accident, defendant stated that he did not know what happened. Trooper Reynolds testified that defendant had red, glassy eyes, slurred speech and a strong odor of alcohol on his breath.

According to Trooper Reynolds, there appeared to be no one else involved in the accident and there were no witnesses to the accident. Trooper Reynolds spoke with another individual near the scene of the accident whom he allowed to take the moped so that he would not have to call a tow truck. No additional testimony was provided concerning this individual; however, Trooper Reynolds testified that speaking with this person did not change his opinion that defendant had been driving the moped.

Later, at the hospital, defendant told Trooper Reynolds that he thought he had been involved in an accident that day, but could not remember any details. Defendant told Trooper Reynolds that he started drinking whiskey probably around 4:00 or 5:00 p.m.[1] Defendant ranked himself as a five on a scale of one to 10, 10 being "plenty drunk," and admitted that he was not in a condition to safely operate a vehicle. Defendant refused a blood test to determine blood alcohol level. At trial, defendant never disputed the testimony regarding his intoxication.

On 23 July 2009, Defendant was found guilty of both offenses in Buncombe Country District Court. Defendant appealed the

[1] The time of the accident was approximately 4:01 p.m.

district court's decision to superior court for a trial *de novo*. On 24 and 25 August 2009, defendant's trial took place in Buncombe County Superior Court. At the trial, defendant presented testimony from Megan Fultz ("Fultz"). On the Sunday before the trial began, Fultz spoke with defendant at a grocery store and learned for the first time that defendant had been involved in an accident. Defendant asked Fultz to testify regarding her observations on 14 February 2008 and she agreed to do so. At trial, Fultz testified that on the day of the accident she saw an unidentified individual driving a moped with a helmet on and defendant was riding on the back as a passenger. Fultz stated that she was aware that defendant was drunk at the time. At the close of evidence, defendant made a motion to dismiss both charges, which the trial court denied.

The jury returned a guilty verdict as to both charges. The trial court sentenced defendant to 30 days imprisonment for the reckless driving conviction, which was suspended. Defendant was sentenced to 60 days imprisonment for the driving while impaired conviction, which was also suspended. Defendant was ordered to complete 24 hours of community service within 30 days and remain on supervised probation for 12 months. Defendant gave notice of appeal in open court.

Analysis

On appeal, defendant argues that: (1) the trial court erred in denying his motion to dismiss the charge of driving while impaired because the State failed to present substantial evidence that Mr.

Hensley was driving the moped, and (2) the trial court erred in denying his motion to dismiss the charge of reckless driving because the State failed to present any evidence that the moped was driven at a speed or in a manner so as to endanger or be likely to endanger any person or property.

I. Standard of Review

> When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (internal citations and quotation marks omitted). In order to have the charges submitted to the jury, the State must provide substantial evidence; however, substantial evidence does not need to be "irrefutable or uncontroverted." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002). "[E]vidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant's guilt." *Id.* at 145, 567 S.E.2d at 139-40. "[T]he trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

II. Driving While Impaired

Defendant was convicted of violating N.C. Gen. Stat. § 20-138.1(1) (2009), which states in pertinent part: "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) [w]hile under the influence of an impairing substance[.]" Defendant argues that the State failed to present substantial evidence to establish that defendant was the driver of the moped.[2] We disagree and hold that the circumstantial evidence presented at trial was sufficient to establish that defendant was the driver of the moped.

This case is similar to *State v. Riddle*, 56 N.C. App. 701, 289 S.E.2d 598, *disc. review denied*, 305 N.C. 763, 292 S.E.2d 16 (1982). In *Riddle*, the defendant claimed that he was a passenger in the car that caused a fatal accident and that the driver abandoned the car and ran into the woods after the accident. *Id.* at 702-03, 289 S.E.2d at 598-99. The defendant appeared to be intoxicated and smelled of alcohol. *Id.* at 703, 289 S.E.2d at 599. The investigating officer attempted to open the driver's side door from which the driver allegedly emerged and fled, but he could not get it open due to the damage it sustained in the accident. *Id.* Additionally, a witness at the scene saw the defendant standing beside the car on the passenger side soon after the accident, but did not see anyone else. *Id.* at 702-03, 289 S.E.2d at 598-99. Deputies searched the surrounding area and did not find another

[2] Defendant does not argue that he was not under the influence of an impairing substance at the time of the accident.

individual or any evidence of someone escaping through the woods. *Id.* at 703, 289 S.E.2d at 599. This Court held:

> While the evidence that defendant was the driver of the car which struck that of the decedent was entirely circumstantial, "the identity of the driver of an automobile at the time of a collision may be established by circumstantial evidence, either alone or in combination with direct evidence." "[C]ircumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment."

Id. at 704, 289 S.E.2d at 599-600 (quoting *Helms v. Rea*, 282 N.C. 610, 616-17, 194 S.E.2d 1, 5-6 (1973)). The Court found no error in the trial court's denial of the defendant's motion to dismiss. *Id.* at 704, 289 S.E.2d at 600.

Here, the State's evidence tended to establish that Trooper Reynolds arrived at the scene approximately 12 minutes after receiving a dispatch notifying him that an accident had occurred and saw that defendant was present and injured. Other emergency personnel were at the scene before Trooper Reynolds arrived; however, no one saw another individual who may have been driving the moped. Trooper Reynolds also completed an investigation of the surrounding area but was unable to find any evidence that suggested that another person was involved in the accident. Moreover, defendant, who was injured and clearly intoxicated could not say whether or not he was the operator of the moped. This circumstantial evidence is sufficient to permit a reasonable jury to conclude that defendant was the driver of the moped. "If there

is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it[,]" then the motion to dismiss should be denied. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Defendant presented testimony from Fultz which suggested that defendant was not driving the moped; instead, it was another individual, and defendant was only riding on the back of the moped. Relying on *State v. Roop*, 255 N.C. 607, 122 S.E.2d 363 (1961), defendant contends that this Court should consider Fultz' testimony when determining whether the motion to dismiss was properly denied. Our Supreme Court stated in *Roop*:

> It is familiar learning that on a motion for judgment of nonsuit the State is entitled to have the evidence considered in its most favorable light, and that defendant's evidence, unless favorable to the State, is not to be considered, except when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence[.]

Id. at 611, 122 S.E.2d at 365-66 (internal citation omitted).

Defendant claims that Fultz' testimony served "to explain or make clear the State's evidence." Defendant's argument is without merit. Essentially, defendant is asking this Court to accept Fultz' testimony as true and hold that defendant was not the driver of the moped. It is not within the province of this Court to decide such issues of fact or credibility of witnesses. The jury as the finder of fact is charged with weighing the evidence and determining whether Fultz' testimony was credible. *State v. Hyatt*,

355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002) (acknowledging that "it is the province of the jury, not the court, to assess and determine witness credibility"). While Fultz' testimony suggests that defendant at one point in the day was a passenger on the moped, and, therefore, may not have been the driver of the moped at the time of the accident, it is well established that "contradictions and discrepancies [in the evidence] are for the jury to resolve and do not warrant dismissal" by the trial court. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1990). The only determination for this Court to make is whether the evidence viewed in the light most favorable to the State was sufficient to justify the denial of defendant's motion to dismiss. *Roop*, 255 N.C. at 611, 122 S.E.2d at 365-66. Upon review of the State's evidence, there was substantial evidence, albeit circumstantial, to establish that defendant was operating the moped at the time of the accident. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss.

III. Reckless Driving to Endanger

Next, defendant was charged with reckless driving to endanger pursuant to N.C. Gen. Stat. § 20-140(b) (2009). This statute states in pertinent part: "Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." Defendant claims that even if this Court determines, as we have, that there was substantial evidence that he

was driving the moped at the time of the accident, the State did not present substantial evidence that he was driving at a speed or in a manner so as to endanger or be likely to endanger any person or property. We disagree.

Defendant is correct in that there was no evidence presented to the jury regarding the speed at which the moped was traveling; however, defendant ignores the portion of the statute which states that a person is guilty of the offense if he drives a vehicle "in a manner so as to endanger or be likely to endanger any person or property." *Id.* Defendant relies on *State v. Roberson*, 240 N.C. 745, 83 S.E.2d 798 (1954), for the proposition that in the absence of evidence regarding speed, physical evidence at the scene of the accident is insufficient to find the defendant guilty. However, the Court in *Roberson* focused on the lack of evidence with regard to speed because there was no evidence, as there is here, that the defendant was intoxicated. *Id.* at 748, 83 S.E.2d at 801.

In the present case, the evidence at trial tended to establish that defendant was intoxicated and could not remember the accident or anything leading up to the accident. Our Supreme Court has ruled that "operation of [a vehicle] in a drunken condition constituted a driving of it upon the public highway without due caution and circumspection and in a manner so as to endanger persons or property, and was reckless driving within the intent and meaning of G.S. § 20-140(b)." *Bank v. Lindsey*, 264 N.C. 585, 587, 142 S.E.2d 357, 360 (1965). The State's evidence that defendant was intoxicated while driving the moped, which resulted in an

accident, was sufficient to establish that defendant drove in a manner so as to endanger or be likely to endanger any person or property. Accordingly, the trial court did not err in denying defendant's motion to dismiss the reckless driving charge.

Conclusion

The trial court in this case did not err in denying defendant's motion to dismiss the charges against him. There was substantial circumstantial evidence presented such that a reasonable jury could find defendant guilty of driving while impaired and evidence of defendant's intoxication while driving was sufficient to establish that he was driving in a manner so as to endanger or be likely to endanger any person or property.

No Error.

Judges CALABRIA and ARNOLD concur.

Report per Rule 30(e).