NO. COA12-33
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v. Forsyth County
No. 10 CRS 56211

LINWOOD FULTON

Appeal by defendant from judgment entered 3 August 2011 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 6 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Charlotte Gail Blake, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Linwood Fulton appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired. At trial, defendant submitted a written proposal for a special jury instruction stating that the results of a chemical analysis showing his blood alcohol concentration did not create a "legal presumption" that a defendant had an alcohol concentration of .08 or more and thus the jury was not compelled

to return a guilty verdict where a chemical analysis report established an alcohol concentration of .08 or more. The trial court denied defendant's request and gave the pattern jury instruction on the offense of driving while impaired to the jury.

Defendant now argues the trial court erred in denying his request for a special jury instruction because the pattern jury instruction given by the trial court improperly allowed the jury to find defendant guilty based on the results of the chemical analysis alone and that the pattern jury instruction creates a presumption that defendant had an alcohol concentration of 0.08 or above at a relevant time after driving. Defendant's argument is misplaced.

"The three essential elements of the offense of impaired driving are (1) driving a vehicle (2) upon any public vehicular area (3) while under the influence of an impairing substance 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." *State v. Narron*, 193 N.C. App. 76, 79, 666 S.E.2d 860, 863 (2008) (citations and quotation marks omitted), *disc. review denied*, 363 N.C. 135, 674 S.E.2d 140 (2009), *cert. denied*, ___ U.S. ___, 175 L. Ed. 2d 26 (2009); *see also* N.C.

Gen. Stat. § 20-138.1 (2011). "Thus, there are two ways to prove the single offense of impaired driving: (1) showing appreciable impairment; or (2) showing an alcohol concentration of 0.08 or more." *Narron*, 193 N.C. App. at 79, 666 S.E.2d at 863 (citation and quotation marks omitted). This Court has previously rejected the argument defendant advances in this case that the pattern jury instruction at hand creates a presumption of fact. *Id.* at 79-85, 666 S.E.2d at 863-66. Rather, this Court held that "[t]he result of a chemical analysis is a report of a person's alcohol concentration, and . . . the result of such a test constitutes *prima facie* evidence of the defendant's alcohol concentration as reported in the results." *Id.* at 84, 666 S.E.2d at 866.

Defendant's argument appears to be based upon a belief that he presented evidence rebutting the results stated in the chemical analysis report. However, defendant's evidence that he performed well on field sobriety tests, did not weave between lanes of traffic or straddle lanes, and did not have slurred speech does not rebut the State's chemical analysis evidence as a matter of law, but simply provides a basis upon which the jury could, if it chose, conclude that the results of the chemical analysis were not credible.

We hold the trial court properly instructed the jury as to both theories of impaired driving, and charged the jury to weigh all the evidence in the case and the credibility of the witnesses before arriving at its verdict. The trial court's instruction did not limit the evidence which the jury could consider, and the weight given to the chemical analysis results was left to the province of the jury. Contrary to defendant's argument, a jury may convict a defendant for driving while impaired based solely upon its determination that the defendant had an alcohol concentration of 0.08 or more at any relevant time after driving, as shown by the results of a chemical analysis of a blood sample. Accordingly, we find the trial court did not err in denying defendant's request for a special jury instruction.

No error.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).