

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-528
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

STATE OF NORTH CAROLINA

v.

Guilford County
No. 11CRS075413

JOHN MARSHALL NUNN,
Defendant.

Appeal by defendant from judgment entered on or about 10 October 2012 by Judge Anderson D. Cromer in Superior Court, Guilford County. Heard in the Court of Appeals 5 November 2013.

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

Grey Powell, for defendant-appellant.

STROUD, Judge.

Defendant John Marshall Nunn appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired ("DWI"). The trial court sentenced defendant to a Level II punishment, based on his previous DWI conviction in Duplin County on 20 October 2011, to a term of 12 months imprisonment. The court suspended defendant's sentence, placed defendant on supervised probation for 36 months, and ordered

defendant to serve 21 days in jail. Defendant gave notice of appeal in open court.

Defendant first argues the trial court erred in denying his motion to dismiss the DWI charge. Defendant contends the State failed to present sufficient evidence that he actually drove or operated a vehicle while under the influence of an impairing substance. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed. 2d 150 (2000). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving

the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L.Ed. 2d 818 (1995). To convict defendant of driving while under the influence, the State was required to present substantial evidence that defendant (1) drove or operated a vehicle, (2) upon any highway, street or public vehicular area, (3) "[w]hile under the influence of an impairing substance[.]" See N.C. Gen. Stat. § 20-138.1(a) (2011).

At trial, Trooper K. M. Kutzer testified that on 4 May 2011 he responded to a single-vehicle accident on Groomtown Road just south of Greensboro, North Carolina. At the scene he saw that a white Ford F-150 pickup truck had run off the roadway, down into a field, and then had backed up into a tree line where it got stuck in the mud. The truck was later determined to be registered to defendant. Trooper Kutzer found defendant passed out behind the steering wheel with the keys in the ignition and had to do a "sternum rub" with his baton to wake defendant. Trooper Kutzer asked defendant from where he was coming and where he was going, and defendant replied "home" to both questions. Trooper Kutzer noticed a strong odor of alcohol about defendant and administered field sobriety tests to

defendant, which he either failed or declined to perform. Defendant was taken into custody and transported to the Guilford County jail.

Trooper Kutzer further testified that while at the jail, defendant submitted to an Intoximeter test, which determined defendant's blood alcohol concentration ("BAC") was .23. During the fifteen minute observation period involved in administering the Intoximeter test, Trooper Kutzer asked defendant several questions. In response to these questions, defendant admitted that he was operating the truck, that there were no mechanical issues with the truck, that he was both going to and coming from "home," and that he did not know on what street or highway he was traveling. Defendant additionally stated that he believed he was "completely drunk[,] " should not have been operating a vehicle, that there were no passengers in his truck, and that he had not had any alcoholic beverages since the crash.

We hold Trooper Kutzer's testimony constitutes substantial evidence of each of the elements of the offense of driving while impaired. See *id.* Accordingly, we find no error in the trial court's denial of defendant's motion to dismiss the charge against him.

Defendant also argues the trial court erred in considering his BAC level when imposing a sentence, because the State failed to present sufficient evidence that his BAC was .15 or greater. Contrary to defendant's argument, however, the trial court did not base its determination of defendant's DWI sentencing level on his BAC level. The court sentenced defendant as a Level II offender based on his prior DWI conviction in Duplin County on 20 October 2011. Accordingly, defendant's argument is without merit.

NO ERROR.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).