NO. COA14-217
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Cleveland County
No. 12 CRS 780

HARRISON BURRIS, JR.
Defendant.

Appeal by defendant from judgment entered 25 July 2013 by Judge William R. Bell in Cleveland County Superior Court. Heard in the Court of Appeals 13 August 2014.

Roy Cooper, Attorney General, by Tammera S. Hill, Assistant Attorney General, for the State.

James N. Freeman, Jr., for defendant-appellant.

DAVIS, Judge.

Defendant Harrison Burris, Jr. ("Defendant") appeals from his conviction for habitual impaired driving. On appeal, he contends that the trial court erred in (1) denying his motion to dismiss; and (2) admitting the testimony of the officer who performed an Intox EC-IR II test ("Breathalyzer test") on him

concerning the results of that test. After careful review, we vacate the judgment and remand for a new trial.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 7 October 2011, Defendant, George Turner ("Turner"), and another individual drove to a club in South Carolina in a Chevrolet SUV ("the SUV") that was owned by Renee Barrett Burris — a family member of Defendant's — to celebrate Defendant's birthday. Shortly after 2:00 a.m., Defendant, Turner, and a third person known as "Rick" got into the SUV and began driving toward Gastonia, North Carolina.

On the on-ramp to I-85 from NC-216, the SUV spun out of control and crashed into a ditch on the left side of the road. Shortly thereafter, a Mustang occupied by three unknown persons pulled over behind the SUV to offer assistance.

At approximately 7:58 a.m., Trooper Ben Sanders ("Trooper Sanders") with the North Carolina Highway Patrol was dispatched to the scene of the accident. Upon his arrival, he observed Defendant, Turner, and the three occupants of the Mustang near the wrecked SUV. Trooper Sanders walked up to Defendant and asked him what had happened. Trooper Sanders testified that Defendant told him that the SUV "was his vehicle" and that he was responsible for it. Trooper Sanders then asked Defendant

who had been driving the SUV, and Defendant replied that "he didn't know."

While Trooper Sanders was speaking with Defendant, Sergeant Greg Johnson ("Sgt. Johnson") of the North Carolina Highway Patrol arrived on the scene. Sgt. Johnson had been in the vicinity of the accident when he overheard the dispatch to Trooper Sanders and decided to also proceed to the accident site. After arriving at the scene, Sgt. Johnson observed Trooper Sanders speaking with Defendant and began walking over to the Mustang where Turner and the three other men were standing. As Sgt. Johnson approached them, Trooper Sanders again asked Defendant if he knew who had been driving the SUV. Defendant, speaking in a whisper, told Trooper Sanders that it was the "guy that was behind him" and nodded his head backwards in the direction of Turner. Trooper Sanders "looked at the gentleman that he was motioning at [Turner], and he shook his head right to left in a no, it wasn't me."

Sgt. Johnson also saw Defendant gesture toward Turner. Upon observing Defendant's mannerisms while he was answering Trooper Sanders' questions, Sgt. Johnson formed the opinion that Defendant was lying. Sgt. Johnson then asked: "[L]ook, were you driving? . . . [A]ll I want is the truth . . . [T]he truth will set you free[.]" Defendant looked at him and said: "[Y]es, I

was." Trooper Sanders was present throughout the entire exchange between Defendant and Sgt. Johnson.

Sgt. Johnson went back to speak with Turner and asked him who had been driving and how the wreck had occurred. Turner stated to Sgt. Johnson that Defendant had in fact been driving the SUV.

Trooper Sanders asked Defendant if he had a driver's license or some other form of identification to which Defendant responded "no." Trooper Sanders then patted him down, located his wallet, and found an identification card for Defendant. Trooper Sanders stated that "[w]hile I was patting him down, I could smell a strong odor of alcohol. I also could smell an odor of gum. While I was talking with him, he had — I noticed his eyes were red and glassy. He [sic] eyes were bloodshot. Also the odor of alcohol was overpowering the gum." Trooper Sanders further noted that "[w]hile he was standing outside of his car, [Defendant] was unsteady on his feet. He was swaying side to side a little bit." At this point, based upon his observations, Trooper Sanders arrested Defendant for driving while impaired.

Trooper Sanders placed Defendant in his patrol car and brought him to the Cleveland County Law Enforcement Center ("the LEC"). On the way to the LEC, Defendant told Trooper Sanders that he had not been driving and that the man who had been

driving had run off into the woods after the wreck. However, Defendant was unable to provide the name of the alleged driver.

At the LEC, Trooper Sanders brought Defendant to the room where Breathalyzer tests are conducted and read Defendant his rights as they pertained to the test. At 9:06 a.m., Defendant provided a breath sample which registered a blood alcohol level of .13. Defendant then refused to blow into the Breathalyzer a second time — thereby failing to complete the test — and Trooper Sanders recorded his refusal to do so as a "willful refusal."

On 12 March 2012, Defendant was indicted on one count of habitual impaired driving. A jury trial was held in Cleveland County Superior Court on 23 July 2013. Defendant moved to dismiss the charge against him at the close of the State's evidence and renewed his objection at the close of all the evidence. The trial court denied both motions.

During his case-in-chief, Defendant presented testimony from Turner regarding these events. Turner testified that in addition to Defendant, Turner, and the third unnamed individual, another man — identified only as "Rick" — was also at the club in South Carolina to celebrate Defendant's birthday. Turner stated that after leaving the club shortly after 2:00 a.m., he, Defendant, and Rick got into Defendant's SUV and began driving back to Gastonia, North Carolina. Turner testified that Rick was driving the SUV.

Turner further testified that after the SUV spun out of control and wrecked, Rick got out of the car and ran off into the woods before anyone else arrived on the scene. He also stated that after Trooper Sanders and Sgt. Johnson arrived, Sgt. Johnson came up to Turner and asked if he was hurt or needed medical attention. Turner denied ever being asked by Sgt. Johnson who was driving the SUV and testified that he never told Sgt. Johnson that Defendant had been driving. He also denied overhearing Trooper Sanders' conversation with Defendant.

The jury found Defendant guilty of habitual impaired driving. The trial court sentenced him to 24-29 months imprisonment. Defendant gave timely notice of appeal to this Court.

Analysis

I. Denial of Motion to Dismiss

Defendant's first argument is that the trial court erred in denying his motion to dismiss. Specifically, Defendant asserts that the State failed to present sufficient evidence that he was the driver of the SUV or that he was appreciably impaired.

> In ruling on a motion to dismiss for insufficient evidence, the trial court must determine whether substantial evidence of each element of the offense charged has been presented. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The trial court must view all evidence in the light most favorable to the State and

> draw all reasonable inferences in the State's favor.

State v. Gregory, 154 N.C. App. 718, 720-21, 572 S.E.2d 838, 840 (2002) (internal citations and quotation marks omitted).

North Carolina General Statute § 20-138.1(a) provides, in pertinent part, that

> [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. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]

N.C. Gen. Stat. § 20-138.1(a) (2013). In *State v. Tedder*, 169 N.C. App. 446, 610 S.E.2d 774 (2005), we held that "[t]he essential elements of DWI are: (1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *Id.* at 450, 610 S.E.2d at 777 (citation and quotation marks omitted). Defendant does not challenge the sufficiency of the evidence as to the second element, so we must analyze only the first and third elements.

A. Identity of the Driver

Defendant asserts that the only competent evidence tending to sufficiently establish that he was the driver of the SUV was his extrajudicial confession made to Trooper Sanders and Sgt. Johnson at the accident scene. Defendant is correct that pursuant to the *corpus delicti* rule, "a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction. . . . [T]here [must] be corroborative evidence, independent of defendant's confession, which tended to prove the commission of the charged crime." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986) (internal citations omitted).

In *Trexler*, the defendant was involved in a single vehicle wreck and then walked away from his vehicle and went home. *Id.* at 529, 342 S.E.2d at 879. When an officer arrived at the scene of the accident, the defendant returned to the wreck and told the officer that the car was his and that he was the person who had been driving it. *Id.* The defendant further admitted he had been at a party earlier and had consumed several beers. *Id.* The officer arrested him for driving while impaired. *Id.* at 530, 342 S.E.2d at 879.

Our Supreme Court held that the State had presented sufficient evidence to withstand the defendant's motion to dismiss, concluding that

> [t]he *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred. The independent evidence must touch or be concerned with the *corpus delicti*.

Id. at 532, 342 S.E.2d at 880-81 (internal citations omitted). The corroborative evidence relied upon by the Court in *Trexler* was:

> (1) the fact that the overturned automobile was lying in the middle of the road and that a single person was seen leaving the automobile; (2) the fact that when defendant returned to the scene, he appeared to be impaired as a result of using alcohol; (3) the fact that defendant later blew 0.14 on a breathalyzer; and (4) the fact that the wreck was otherwise unexplained. This evidence is sufficient to corroborate defendant's admission that he drove the vehicle on a public highway or vehicular area after he had consumed alcohol and, when considered with his admissions, was sufficient to support a reasonable inference that at the time he was driving the motor vehicle he had consumed a sufficient amount of alcohol to raise his blood alcohol level to 0.10 or greater at a relevant time after driving.

Id. at 533, 342 S.E.2d at 881.

Similarly, in *State v. Cruz*, 173 N.C. App. 689, 620 S.E.2d 251 (2005), the defendant was convicted of DWI and driving with a revoked license and moved to dismiss both charges based on the *corpus delicti* rule. *Id.* at 690-91, 620 S.E.2d at 252-53. The defendant drove his car to the scene of an accident involving

his nephew and upon exiting his vehicle began to act in a belligerent manner. Officers detected an odor of alcohol on him, and he admitted to having been drinking earlier in the evening and having driven to the scene of the accident. *Id.* at 691, 620 S.E.2d at 253. He was arrested for DWI. *Id.*

In upholding the trial court's denial of the defendant's motion to dismiss the DWI charge, we held that the *corpus delicti* rule was satisfied where the defendant's confession was corroborated by several officers and witnesses testifying to defendant's drinking and impairment as well as the fact that a car similar to the one owned and operated by defendant was seen traveling down the road near the accident and turning down a side street — just as defendant confessed to doing. *Id.* at 696, 620 S.E.2d at 256. The Court held that "[a]bsent defendant's confession, the circumstantial evidence of defendant's driving would likely not be enough to support a conviction, however with his confession it is." *Id.* at 696-97, 620 S.E.2d at 256.

Defendant relies on *State v. Smith*, 362 N.C. 583, 669 S.E.2d 299 (2008), in support of his argument that his extrajudicial confession was not sufficiently corroborated by independent evidence. In *Smith*, the defendant made an extrajudicial confession to receiving oral sex from a minor. *Id.* at 594, 669 S.E.2d at 307. The defendant made this confession to a detective at a police station. *Id.* The

defendant's friend had accompanied the defendant to the police station and met the defendant outside immediately after the defendant had confessed. *Id.* The defendant told his friend that he had admitted to having oral sex with a minor. *Id.* Our Supreme Court held that the defendant's statement to his friend was not sufficiently independent of the defendant's confession made at the police station given that it was made immediately following the defendant's meeting with the detective. *Id.* at 594-95, 669 S.E.2d at 307. In essence, the Court treated the defendant's statement to his friend as a mere continuation of his extrajudicial confession, reasoning that "because these statements were derived from the extrajudicial confession given to [the detective] just minutes before, they have no more probative value than the extrajudicial confession itself." *Id.*

The present case is distinguishable from *Smith*. Here, Defendant admitted to Sgt. Johnson that he was the driver of the SUV when it wrecked. Trooper Sanders also heard Defendant make this admission. Furthermore, at the scene of the accident, Turner also told Sgt. Johnson that Defendant had been driving. Turner made this statement independently of Defendant's confession. Moreover, Defendant told Trooper Sanders that the SUV was his and that he was responsible for it. Thus, viewed in the light most favorable to the State and drawing every inference in the State's favor, there was sufficient evidence

corroborating Defendant's extrajudicial admission that he was the driver of the SUV.

B. Appreciable Impairment

Defendant next argues that there was insufficient evidence to sufficiently establish the third element of the offense of DWI — that he was appreciably impaired. We disagree.

> An officer's opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer's personal observation of an odor of alcohol and of faulty driving or other evidence of impairment. The refusal to submit to an intoxilyzer test also is admissible as substantive evidence of guilt on a DWI charge.

Gregory, 154 N.C. App. at 721, 572 S.E.2d at 840. However, an officer must base his opinion that a defendant is impaired on more than just an odor of alcohol emanating from him. *See Tedder*, 169 N.C. App. at 450, 610 S.E.2d at 777 ("A law enforcement officer may express an opinion that a defendant is impaired, so long as that opinion is based on something more than an odor of alcohol.").

This Court has held that "the State need not show that the defendant was 'drunk,' *i.e.*, that his or her faculties were materially impaired. The fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical and mental faculties, is sufficient *prima facie* [evidence] to show a

violation of N.C. Gen. Stat. § 20–138.1." *State v. Norton*, 213 N.C. App. 75, 79, 712 S.E.2d 387, 390 (2011) (internal citations, quotation marks, and brackets omitted). In addition, "[i]f any person charged with an implied-consent offense refuses to submit to a chemical analysis . . . at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action against the person." N.C. Gen. Stat. § 20-139.1(f) (2013).

In the present case, Trooper Sanders detected a strong odor of alcohol emanating from Defendant's person. Trooper Sanders further observed that Defendant's eyes were red and glassy and that "[w]hile he was standing outside of his car, [Defendant] was unsteady on his feet. He was swaying side to side a little bit." In addition, after initially agreeing to undergo a Breathalyzer test, he refused to complete the test by blowing a second time, as required, into the Intox EC-IR II device.

We believe that this evidence was sufficient to establish the third element of N.C. Gen. Stat. § 20-138.1(a). Therefore, Defendant's argument on this issue is overruled.

II. Breathalyzer Evidence

Defendant's final argument is that the trial court erred in overruling his trial counsel's objection to the testimony of Trooper Sanders in which he stated that the results of

Defendant's Breathalyzer test revealed that Defendant had a blood alcohol level of .13.

> Preserved legal error is reviewed under the harmless error standard of review. . . . North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. In such cases the defendant must show a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

State v. Lawrence, 365 N.C. 506, 512-13, 723 S.E.2d 326, 330-31 (2012) (internal citations and quotation marks omitted).

North Carolina General Statute § 20-139.1(b) sets out the requirements that must be met in order for a Breathalyzer test to be administered. N.C. Gen. Stat. § 20-139.1(b) requires, among other things, that "[t]he person performing the analysis ha[ve], at the time of the analysis, a current permit issued by the Department of Health and Human Services authorizing the person to perform a test of the breath using the type of instrument employed." N.C. Gen. Stat. § 20-139.1(b)(2).

It appears to be undisputed that no evidence was presented showing that Trooper Sanders held a valid permit issued by the Department of Health and Human Services to administer a Breathalyzer test with the Intox EC-IR II device. The trial court, therefore, instructed the jury solely on the first prong of N.C. Gen. Stat. § 20-138.1(a)(1) and did *not* instruct the

jury that it could find Defendant guilty should it determine that Defendant had registered a blood alcohol level greater than .08 during the Breathalyzer test pursuant to N.C. Gen. Stat. § 20-138.1(a)(2). However, the trial court nevertheless allowed Trooper Sanders to testify that the Breathalyzer Test showed that Defendant's blood alcohol level was .13.

On appeal, the State does not argue that the admission of Trooper Sanders' testimony regarding the results of Defendant's Breathalyzer test was proper. Therefore, we must only determine whether the error was prejudicial.

Both this Court and our Supreme Court have recognized the great weight that juries attach to evidence regarding the results of a chemical analysis. *See State v. Helms*, 348 N.C. 578, 583, 504 S.E.2d 293, 296 (1998) ("[I]n light of the heightened credence juries tend to give scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial."); *State v. Roach*, 145 N.C. App. 159, 161-62, 548 S.E.2d 841, 844 (2001) ("Because so much weight and deference is given to a chemical analysis test, it is necessary that a proper foundation be laid before admitting evidence as to the outcome of a chemical analysis test in a driving while impaired case.").

We believe the admission of Trooper Sanders' testimony regarding the results of the Breathalyzer test prejudiced Defendant. In our view, there is a reasonable possibility that a different result would have been reached by the jury had this testimony not been allowed. Specifically, given that no field sobriety tests were performed, there is a reasonable possibility that a juror would not have been convinced that Defendant was appreciably impaired beyond a reasonable doubt but for hearing the Breathalyzer test result. Therefore, we vacate Defendant's judgment and remand for a new trial.

Conclusion

For the reasons stated above, we conclude that Defendant is entitled to a new trial.

NEW TRIAL.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).