NO. COA14-408

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Nash County
No. 12 CRS 54771

WILLIAM MCKINLEY RICKS

Appeal by defendant from judgment entered 14 November 2013 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 8 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for the State.

Amanda S. Zimmer for defendant-appellant.

McCULLOUGH, Judge.

William McKinley Ricks ("defendant") appeals from judgment entered upon his conviction for habitual impaired driving. For the following reasons, we reverse.

I. Background

Defendant was arrested on 24 September 2012 and later indicted by a Nash County Grand Jury on 3 December 2012 on a charge of habitual impaired driving. On 13 November 2013, the case was called for jury trial in Nash County Superior Court, the Honorable Quentin T. Sumner, Judge presiding.

The State's evidence at trial tended to show the following: At approximately 7:30 p.m. on 24 September 2012, T. D. White, a former patrol officer with the City of Rocky Mount Police Department, responded to a call from dispatch reporting a moped accident in the area of South Church Street and Bassett Street. White described the area as a vacant lot at the intersection of South Church Street and Bassett Street surrounded by businesses on both sides. White testified it appeared there had been a building on the lot at some point, but all that remained was a driveway cutting directly across the lot from South Church Street to Bassett Street. White referred to the driveway as a cut through and testified to having seen people walk and ride bicycles across it. White recalled that the driveway appeared to have been paved at one time, but was now dirt. White explained that the foot and bicycle traffic kept the area mowed down. There were no fences or barriers preventing access to the lot or cut through. White testified the cut through was wide enough to drive a motor vehicle through, explaining that he pulled his patrol car into the cut through when dealing with defendant. White also testified that he had seen cars use the cut through to turn around. Yet, it was mostly used for foot and bicycle traffic. White never found out who owned the lot.

The fire department was already on the scene when White arrived. White recalled that the fire truck had pulled up on the sidewalk and was parked on the edge of the vacant lot and the firemen were gathered around a man on a moped in the vacant lot. As White approached, a fireman informed White that the man on the moped, later identified as defendant, had laid the moped down in the lot but appeared uninjured. The fireman added that he believed defendant might be impaired.

When White first encountered defendant, defendant was already back on the moped with the engine running. White asked defendant to turn the moped off and to step off of the vehicle. Defendant complied, but struggled and stumbled as he dismounted the moped. White then asked defendant to take his helmet off. Upon the removal of defendant's helmet, White immediately detected a strong odor of alcohol on defendant's breath. White then asked defendant to produce his I.D. Defendant again complied, but fumbled through his wallet for approximately 30 to 45 seconds to retrieve an I.D. that White could clearly see in the wallet. During their ensuing conversation, defendant informed White that he had consumed one drink earlier in the day around noon. White, however, was suspicious about the accuracy of this statement since he noticed defendant's speech was

slurred and the odor of alcohol was still present on defendant's breath.

White informed defendant that he suspected that defendant was impaired and asked defendant to submit to field sobriety tests. Defendant complied, but did not perform the tests to the satisfaction of White. As a result of defendant's slurred speech, the odor of alcohol, and defendant's poor performance on the field sobriety tests, White formed the opinion that defendant was appreciably impaired by alcohol and arrested defendant for suspicion of DWI. As White took defendant into custody, defendant argued that he was on private property.

Defendant was transported to the police department where Officer David Bowers administered a breath analysis. Bowers testified the results of the breath test revealed defendant had a blood alcohol level of 0.17.

At the conclusion of the State's evidence, defendant moved to dismiss on the basis that the State failed to prove defendant was in a public vehicular area. In response to defendant's motion, the State argued that the vacant lot was "an area used by the public at any time for vehicular traffic[]" and pointed to evidence that the cut through on the vacant lot was used by pedestrians and bicyclists, the cut through was large enough to

fit a police cruiser, and there were no signs, fences, or shrubs of any sort to keep the public out. Upon consideration of the arguments, the trial court denied defendant's motion. Defendant did not put on any evidence.

During a brief charge conference, the trial court informed the parties that he would instruct on impaired driving, inserting the following definition of public vehicular area: "any area within the State of North Carolina used by the public for vehicular traffic at any time including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley or parking lot." Neither party objected.

Defendant then attempted to argue the definition of public vehicular area in accordance with N.C. Gen. Stat. § 20-4.01(32), beyond that specified by the trial court in the charge conference. The State objected to defendant's argument on two separate occasions. The trial court sustained those objections.

At the conclusion of the trial, the jury found defendant guilty of driving while impaired. Defendant then admitted to the existence of prior driving while impaired convictions and pled guilty to the charge of habitual impaired driving. Judgment was entered on 14 November 2013 and defendant was

sentenced to a term of 19 to 32 months imprisonment. Defendant appeals.

II. Discussion

On appeal, defendant raises the following three issues: whether the trial court erred in (1) denying his motion to dismiss; (2) instructing the jury concerning the definition of a public vehicular area; and (3) sustaining the State's objections to his closing argument. We address each issue.

Defendant first argues the trial court erred in denying his motion to dismiss because there was insufficient evidence that he was operating the moped in a public vehicular area.

"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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence

as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "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).

In North Carolina, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a) (2013).

In the present case, the only element of impaired driving in dispute is whether defendant was in a public vehicular area; the evidence is clear that defendant was driving a vehicle, had a blood alcohol concentration above 0.08, and was not operating the moped on a highway or street. Now on appeal, defendant argues, just as he did below, that there was insufficient evidence that the cut through on the vacant lot was a public

vehicular area. Specifically, defendant points out that there was no evidence of who owned the property or that the property was dedicated for public use.

In support of his argument, defendant cites *State v. Lesley*, 29 N.C. App 169, 223 S.E.2d 532 (1976) and *State v. Bowen*, 67 N.C. App. 512, 313 S.E.2d 196 (1984). In both cases, this Court addressed whether the trial courts erred in concluding and instructing the juries that the respective defendants were in public vehicular areas when discovered by law enforcement officers. In *Lesley*, this Court reversed the defendant's conviction in a case in which police found the defendant slumped down in the driver's seat of his car which was parked with the engine running in an unobstructed driveway from a public highway to an abandoned Pepsi-Cola Bottling Plant with "for rent" and "for sale" signs posted in the windows. *Lesley*, 29 N.C. App. at 170, 223 S.E.2d at 533. In reversing, this Court opined that there was sufficient evidence from which the jury could find the defendant guilty of operating a motor vehicle under the influence of alcohol from the public highway onto the driveway, but held the "evidence in the record . . . [was] not sufficient to support the trial court's conclusion that the driveway leading from [the public highway] to the

Pepsi-Cola Bottling Plaint [was] a 'public vehicular area[.]'" *Id.* at 171, 223 S.E.2d at 533. Similarly in *Bowen*, this court reversed the defendant's conviction in a case in which police "found [the] defendant, apparently asleep, at the wheel of his truck, which was sitting with the engine running in the only driveway into a condominium complex." *Bowen*, 67 N.C. App. at 513, 313 S.E.2d at 196. In reversing, this Court noted the sharply conflicting evidence before the trial court.

> The evidence that [it] was a public vehicular area indicated that there was a "For Sale" sign apparently inviting in the public, and that there appeared to be no obstruction to public access; the officers were unaware that it was a condominium complex. Evidence to the contrary indicated that "No Trespassing" signs were posted, that there was no parking set aside for the public, and that the driveway had not been dedicated for public use.

Id. at 514-15, 313 S.E.2d at 197. As a result of the conflicting evidence, this Court concluded "the evidence did not suffice to support the trial court's conclusion *as a matter of law* that the driveway was a 'public vehicular area' within the meaning of the statute." *Id.* at 515, 313 S.E.2d at 197.

In response to defendant's argument, the State contends that this case is distinguishable from *Lesley* and *Bowen*. The State further contends there is sufficient evidence in this case

to show that the cut through on the vacant lot was a public vehicular area.

Upon review of the cases, we agree that *Lesley* and *Bowen* are distinguishable. In those cases, although this Court found the trial courts erred by concluding and instructing the juries that the areas in which the defendants were discovered were public vehicular areas, this Court found there was sufficient evidence to support the impaired driving convictions and granted new trials. *Lesley*, 29 N.C. App. at 171, 223 S.E.2d at 533; *Bowen*, 67 N.C. App. at 515-16, 313 S.E.2d at 197-98. In the present case, the trial court did not remove the issue of whether the cut through was a public vehicular area from the jury's consideration by concluding or instructing that the cut through was a public vehicular area as a matter of law. Instead, the trial court denied defendant's motion to dismiss and allowed the jury to decide the issue. Nevertheless, we hold the trial court erred in this case because there was insufficient evidence that the cut through was a public vehicular area.

In full, a "public vehicular area" is defined in N.C. Gen. Stat. § 20-4.01(32) (2013) as:

> Any area within the State of North Carolina that meets one or more of the following

requirements:

a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:

   1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.

   2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.

   3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).

b. The area is a beach area used by the public for vehicular traffic.

c. The area is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or

> community roads have been offered for dedication to the public.
>
> d. The area is a portion of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.

In contrast, a "private road or driveway" is defined as "[e]very road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic." N.C. Gen. Stat. § 20-4.01(30) (2013).

Both below and now on appeal, the State asserts that, pursuant to N.C. Gen. Stat. § 20-4.01(32)(a), the definition for public vehicular area only requires a showing that "the area is used by the public for vehicular traffic at any time." The State then argues the following evidence is sufficient to allow the jury to decide if the vacant lot was a public vehicular area: White has observed people walking and riding bicycles across the vacant lot; the traffic has maintained a dirt path, or cut through, across the vacant lot connecting South Church Street and Bassett Street; the cut through was wide enough to fit a police cruiser; and there are no barriers or signs preventing access. Upon review, we disagree with the State's interpretation of N.C. Gen. Stat. § 20-4.01(32)(a) and the State's argument that the evidence was sufficient.

Although the examples included in N.C. Gen. Stat. § 20-4.01(32)(a) are listed "by way of illustration and not limitation[,]" they are a component of the relevant definition and cannot be ignored. It is evident from the examples listed that the definition a of public vehicular area set out in N.C. Gen. Stat. § 20-4.01(32)(a) contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public. Furthermore, N.C. Gen. Stat. § 20-4.01(32)(d) provides that "private property used by vehicular traffic and designated by the private property owner as a public vehicular area" is a public vehicular area. If the State's assertion that any area used by the public for vehicular traffic at any time is a public vehicular area is correct, the remainder of the definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32), including subsection (d), is superfluous.

In the present case, there is no evidence concerning the ownership of the vacant lot; nor is there evidence that the vacant lot had been designated as a public vehicular area by the owner. Moreover, a vacant lot is dissimilar to any of the

examples provided in N.C. Gen. Stat. § 20-4.01(32)(a) that are generally open to the public. The fact that people walk and bicycle across the vacant lot as a shortcut does not turn the lot into a public vehicular area. In order to show an area meets the definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32)(a), we hold there must be some evidence demonstrating the property is similar in nature to those examples provided by the General Assembly in the statute. There was no such evidence in this case. Thus, we hold the trial court erred in denying defendant's motion to dismiss.

Although we reverse defendant's conviction based on defendant's first issue on appeal, we briefly emphasize that, as noted above, the entire definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32)(a) is significant to a determination of whether an area meets the definition of a public vehicular area; the examples are not separable from the statute. Consequently, even assuming there was sufficient evidence to allow the jury to decide whether the vacant lot was a public vehicular area, the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with N.C. Gen. Stat. § 20-4.01(32)(a).

III. Conclusion

For the reasons discussed above, we hold the trial court erred in denying defendant's motion to dismiss, instructing the jury concerning the definition of a public vehicular area, and sustaining the State's objections to defendant's closing argument.

Reversed.

Judges ERVIN and BELL concur.