IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-27

Filed: 20 September 2016

Sampson County, No. 13 CRS 757

STATE OF NORTH CAROLINA

v.

DANIEL SCOTT BEST

Appeal by defendant from judgment entered 10 June 2015 by Judge Charles H. Henry, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 22 August 2016.

*Roy Cooper, Attorney General, by Kimberly Randolph, Assistant Attorney General, for the State.*

*Robert L. Schupp for defendant-appellant.*

DAVIS, Judge.

Daniel Scott Best ("Defendant") appeals from his conviction for driving while impaired ("DWI"). On appeal, he contends that the trial court erred in denying his motions to dismiss. After careful review, we conclude that Defendant received a fair trial free from error.

**Factual Background**

The State presented evidence at trial tending to establish the following facts: On 29 June 2013, Officer Tracy Jackson ("Officer Jackson") with the Clinton Police Department was assisting with a DWI checkpoint off of Highway 421 North in Sampson County, North Carolina. During the operation of the checkpoint, Defendant pulled up in his truck and was directed by other officers working at the checkpoint to drive to Officer Jackson's station off to the side of the road.

Officer Jackson approached as Defendant was exiting his vehicle. Officer Jackson observed Defendant "slightly staggering" as he exited his truck and noted that he "had very red, glassy, bloodshot eyes." Officer Jackson also detected "a strong odor of alcohol coming from [Defendant's] person," and upon looking inside Defendant's vehicle observed "two open containers of alcohol in the cup holders."

Defendant refused numerous field sobriety tests and a portable breath test that Officer Jackson requested in order to determine if he was impaired. Upon taking Defendant to the mobile breath alcohol bus[1] that was present at the checkpoint, Defendant also refused to submit to an Intoximeter test even after Officer Jackson informed him that his refusal to submit to the test would result in Defendant's license being revoked for at least one year.

[1] Officer Jackson explained that the breath alcohol bus is "like an RV that's set up as a local magistrate's office and (Inaudible) area, that we can use."

While taking Defendant to the breath alcohol bus, Officer Jackson noticed Defendant walking with "gait ataxia," which he explained was "a drunk-like stupor, a walk, stagger." Officer Jackson further noted that Defendant had "slurred speech" and was "very uncoordinated."

Based on his observations of Defendant, Officer Jackson formed the opinion that he was noticeably impaired and "was under the influence of a central nervous system depressant and was unable to operate a vehicle safely." Officer Jackson ultimately placed Defendant under arrest for DWI.

On 16 December 2014, Defendant was found guilty of DWI in Sampson County District Court. Defendant subsequently appealed to superior court for a trial *de novo*.

On 8 June 2015, a jury trial was held before the Honorable Charles H. Henry, Jr. in Sampson County Superior Court. Officer Jackson was tendered at trial as a drug recognition expert. He testified that in his expert opinion, Defendant "was under the influence of a central nervous system depressant and was unable to operate a vehicle safely."

At the close of the State's evidence and again at the close of all evidence, Defendant moved to dismiss the charge of DWI on sufficiency of the evidence grounds. The trial court denied both motions. On 10 June 2015, the jury found defendant

guilty of DWI.[2] The trial court sentenced Defendant to 24 months imprisonment, suspended the sentence, and placed Defendant on 30 months of supervised probation. As a special condition of probation, however, the trial court ordered Defendant to serve six months of his sentence in the custody of the Sheriff's Office to be followed by thirty months of supervised probation. Defendant filed timely notice of appeal.

**Analysis**

Defendant's sole argument on appeal is that the trial court erred in denying his motions to dismiss. Specifically, he contends that the State failed to present evidence that Defendant was appreciably impaired. We disagree.

> 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 being the perpetrator of such offense. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. . . . When ruling on a motion to dismiss, the trial court should only be concerned with whether the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence.

[2] The jury also found Defendant guilty of carrying a concealed weapon and possession of an open container of alcohol. Defendant does not appeal from these convictions and there is no further information concerning these charges in the record outside of what can be gleaned from the trial transcript.

*State v. Holanek*, __ N.C. App. __, __, 776 S.E.2d 225, 232 (internal citations and quotation marks omitted), *disc. review denied*, 368 N.C. 429, 778 S.E.2d 95 (2015), *cert. denied*, __ U.S. __, __ L.Ed.2d __ (2016).

The offense of DWI in violation of N.C. Gen. Stat. § 20-138.1 requires proof that "(1) [d]efendant 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." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). A person is "under the influence" if he has "drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties." *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985) (citation and quotation marks omitted). "An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired." *Id.* Rather, "[t]he effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired." *Id.*

"The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol." *Mark*, 154 N.C. App. at 346, 571 S.E.2d at 871; *see also State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) ("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."). Moreover, the refusal to submit to a chemical analysis or to perform field sobriety tests is admissible as substantive evidence of a defendant's guilt of DWI. *See* N.C. Gen. Stat. § 20-139.1(f) (2015).

In the present case, the State introduced substantial evidence at trial demonstrating that Defendant was appreciably impaired on 29 June 2013. In addition to introducing evidence of Defendant's refusal to submit to breath analyses and field sobriety tests, the State proffered testimony from Officer Jackson, who gave his expert opinion that Defendant was appreciably impaired and "was under the influence of a central nervous system depressant and was unable to operate a vehicle safely." Officer Jackson based this opinion not only on the smell of alcohol on Defendant's person but also on the fact that Defendant (1) had glassy, bloodshot eyes; (2) staggered getting out of his vehicle; (3) walked with gait ataxia; (4) was "very uncoordinated"; and (5) had slurred speech.

When viewed in the light most favorable to the State, the evidence at trial clearly allowed for a reasonable inference that Defendant was driving while impaired on the night of 29 June 2013. As a result, the trial court did not err in denying his motions to dismiss.

## Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).