IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-330

Filed: 4 December 2018

Forsyth County, No. 15 CRS 40206

STATE OF NORTH CAROLINA

v.

JUSTIN DELANE KRAFT

Appeal by defendant from judgment entered 21 September 2017 by Judge Angela B. Puckett in Forsyth County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Rory Agan, for the State.

Law Offices of Andrew M. Newman, PLLC, by Andrew M. Newman, for defendant-appellant.

ZACHARY, Judge.

Justin Delane Kraft ("Defendant") appeals from his conviction of driving while impaired. Defendant argues that: (1) the trial court erred in denying his motions to dismiss for insufficient evidence, and (2) the trial court erred in admitting

Defendant's medical records. After careful review, we reverse the trial court's judgment.

Factual and Procedural Background

On 4 October 2015 around 2:45 a.m. on a rainy morning, North Carolina Highway Patrol Trooper John Mastromonica ("Trooper Mastromonica") received a dispatch of a vehicle accident on U.S. Highway 52 in King, North Carolina. Trooper Mastromonica was the first responder on the scene, arriving about two minutes after he received the call. Trooper Mastromonica came upon a woman holding Defendant's head as he snored. A motorcycle was on the ground about ten feet away. Trooper Mastromonica flashed his light into Defendant's face, and upon waking up, Defendant started cursing and yelling. Trooper Mastromonica "smelled the strong odor of alcoholic beverage" coming from Defendant and noticed that he was sweating. Defendant had "scrapes and bruises" on his body and his clothes were ripped. Trooper Mastromonica stated that Defendant's condition made it appear to him that "[Defendant] was just recently involved in a motorcycle crash."

Through his investigation, Trooper Mastromonica determined that Defendant was the registered owner of the motorcycle, and was not "struck by any [other] type of vehicle . . . [but] lost control of the motorcycle and laid it down on its side." Trooper Mastromonica testified that there was debris on the road and that he was "able to see fresh gouge marks where it appeared he just laid the bike down." He also stated that

the gouge marks measured sixty-five feet "[f]rom where the gouge marks started to where the bike came to its final rest[.]" Trooper Mastromonica explained that in a motorcycle accident

> someone will lay the bike down, the pegs or the handlebars will dig into the pavement, and the pavement is usually a dark black; and once the gouge marks come in and the handlebars, the pegs, part of the bike hit the asphalt, it turns like a lighter gray. You can see where something slid over it.

Trooper Mastromonica stated that the gouge marks in this accident started on the road and slid off toward an exit ramp on the shoulder. Trooper Mastromonica believed that the gouge marks were "fresh" and recent because he testified that when a road is wet and it is raining, "you will start to see [the gouge marks] fade to the original color of the road" because "[t]he weather usually covers it up[.]"

As Defendant continued to be belligerent, Trooper Mastromonica decided to continue his investigation on scene and permit Defendant to be transported to the hospital for treatment. Trooper Mastromonica, another trooper, and several firefighters from King "walked up and down the median, up and down the wood line" for about a tenth of a mile from the scene of the accident, but were unable to find any sign of other individuals or vehicles involved in the wreck. Defendant left the accident scene in an ambulance around 3:00 a.m., and about an hour later, Trooper Mastromonica went to Baptist Hospital to speak with Defendant. Trooper Mastromonica found Defendant lying in a hospital bed wearing a neck brace. With

Defendant's cooperation, Trooper Mastromonica performed the horizontal gaze nystagmus ("HGN") test and observed all six clues of impairment, which demonstrated "that the [D]efendant had consumed a sufficient quantity of an impairing substance to appreciably impair his mental and physical faculties." Trooper Mastromonica stated that Defendant's position lying in bed flat on his back with a neck brace was "the best position to do [the HGN test]." While there are three standardized field sobriety tests, Trooper Mastromonica explained that he was unable to perform the other two because Defendant was receiving medical treatment. Trooper Mastromonica was also unable to obtain a satisfactory Portable Breath Test reading from Defendant.

Defendant was arrested that same day for driving while impaired. Defendant was tried in Forsyth County District Court on 26 April 2017 and was found guilty, and appealed to Superior Court. Defendant was tried before the Honorable Angela B. Puckett in Forsyth County Superior Court on 20 September 2017.

At Defendant's trial in Superior Court, neither Trooper Mastromonica nor any other witness stated that they saw who was driving the motorcycle when it wrecked; however, Defendant was the only person in the vicinity of the accident wearing a motorcycle helmet and Trooper Mastromonica "thought it was blatantly obvious who was driving the motorcycle." Trooper Mastromonica did not recall finding the keys to the motorcycle or asking Defendant where they were, or asking Defendant if he

had been operating the motorcycle. In addition, Trooper Mastromonica was unaware whether any medications or pain killers were given to Defendant by medical personnel after the accident.

At some point, Defendant's blood was drawn by hospital personnel and the results of this blood draw were recorded in Defendant's medical records. Tammy York, a longtime employee in the medical records division of Wake Forest Baptist Hospital, identified Defendant's electronic medical records and testified that they were created during the regular treatment of the Defendant on the night of the accident. York testified that she was "familiar with the computerized records and the methods under which they were made" and that the copy of Defendant's records presented for admission into evidence was "in the same or substantially similar condition as to when it was created" for Defendant's medical treatment. Over Defendant's objection, the trial court admitted the medical records under the business records exception to the hearsay rule.

Paul Glover, a former branch head of Forensic Tests for Alcohol in the Department of Health and Human Services, was qualified as an expert in alcohol toxicology. Defendant's medical record stated that his blood alcohol level was 271 milligrams per deciliter. Glover purported to convert that number to .22 grams per 100 milliliters at the time of the blood draw.

At the end of the State's evidence and at the close of all the evidence, Defendant moved to dismiss his case for insufficient evidence. Both motions were denied. The jury found Defendant guilty on 21 September 2017, and Defendant filed written notice of appeal on 4 October 2017.

Discussion

Defendant argues that the trial court erred in denying his motions to dismiss for insufficient evidence because the State failed to present substantial evidence that Defendant was the driver of the motorcycle. We agree.

This court reviews the denial of a motion to dismiss *de novo*. *State v. Williams*, ___ N.C. App. ___, ___, 804 S.E.2d 570, 576 (2017). We review to determine whether substantial evidence exists "of each essential element of the offense charged, or of a lesser offense included therein," and whether defendant was "the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Id.* We review "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* at 596, 573 S.E.2d at 869. Contradictions in the evidence do not warrant dismissal and are for the jury to resolve. *Id.* "When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not

about the weight of the evidence." *Id.* at 596-97, 573 S.E.2d at 869. "Substantial evidence is that amount of relevant evidence [whether direct or circumstantial] necessary to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869.

Defendant was charged with impaired driving in violation of N.C. Gen. Stat. § 20-138.1, which prohibits:

> driv[ing] 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)(1), (2) (2015). Therefore, a person is guilty of impaired driving if the person: (1) drives, (2) a vehicle, (3) on a highway, street, or public vehicular area, (4) while under the influence of an impairing substance. *State v. Tedder*, 169 N.C. App. 446, 450, 610 S.E.2d 774, 777 (2005).

In the instant case, Defendant challenges whether the State presented sufficient evidence to support the conclusion that Defendant drove the motorcycle. A person "drives" when he or she is "in actual physical control of a vehicle which is in motion or which has the engine running." N.C. Gen. Stat. § 20-4.01(7), (25) (2015).

The terms "driving" and "operating" are synonymous. *Id.* § 20-4.01(7); *State v. Coker*, 312 N.C. 432, 436, 323 S.E.2d 343, 347 (1984).

Defendant relies on the case of *State v. Ray*, 54 N.C. App. 473, 283 S.E.2d 823 (1981), to support his contention that the State did not show that he drove the motorcycle. In *Ray*, the State presented evidence that the officer found the defendant "approximately halfway in the front seat, between the driver and passenger area in the front seat." *Id.* at 473, 283 S.E.2d at 824. The officer noticed that the defendant smelled of alcohol and had a gash above his nose. *Id.* However, this Court noted that the evidence was "insufficient to support a conclusion" that the defendant had been driving. *Id.* at 475, 283 S.E.2d at 825 ("It is possible that other circumstantial evidence—such as testimony that the defendant was seen driving the car at some point immediately prior to the accident or evidence as to the ownership of the automobile—in addition to the testimony of the officer would have bolstered the State's case. However, no other such evidence was presented."). Thus, the defendant's conviction was reversed "[b]ecause the evidence, taken in a light most favorable to the State, [did] not establish an essential element of the crime charged." *Id.*

Here, viewed in the light most favorable to the State, the State presented evidence that Defendant was found lying about ten feet away from the motorcycle. As in *Ray*, Trooper Mastromonica noticed an odor of alcohol about Defendant, and

Defendant had scratches and torn clothes that would suggest Defendant was involved in an accident. However, the State presented no evidence suggesting that Defendant had been driving the motorcycle rather than a passenger. There was no testimony that Defendant was seen driving the motorcycle or even sitting on it, and there was no evidence that the keys were ever found or that Defendant implicated himself. A defendant's mere presence at the scene, as well as the fact that a defendant may have consumed alcohol is insufficient to tend to show that he was the driver. Although the State established that Defendant was the owner of the motorcycle, this information, even when combined with all the other evidence presented by the State, merely rose to a level of "suspicion or conjecture" that Defendant was the driver of the motorcycle involved in the accident. *Scott*, 356 N.C. at 595, 573 S.E.2d at 868.

Conclusion

While "[m]ost anyone would surmise what happened [in this case], and might very well be right . . . the law prohibits imposing criminal liability based on conjecture." *State v. Eldred*, ___ N.C. App. ___, ___, 815 S.E.2d 742, 742 (2018). Because the evidence reviewed in the light most favorable to the State failed to establish that Defendant was the driver of the vehicle, the motions to dismiss should have been granted. In light of this result, we do not address the other issue presented on appeal. Accordingly, the judgment below is reversed.

REVERSED.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).