IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-830

Filed: 2 July 2019

Haywood County, No. 16 CRS 763

STATE OF NORTH CAROLINA

v.

SAMUEL LEE BAIR

Appeal by defendant by writ of certiorari from judgment entered 27 April 2017 by Judge J. Thomas Davis in Haywood County Superior Court. Heard in the Court of Appeals 10 June 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Colin Justice, for the State.*

*Mary McCullers Reece for defendant-appellant.*

ZACHARY, Judge.

Defendant Samuel Lee Bair appeals from a judgment entered upon his convictions for habitual impaired driving and driving while license revoked. For the following reasons, we conclude that Defendant received a fair trial, free from prejudicial error.

**Background**

On 1 August 2016, Defendant was charged with driving while license revoked and driving while impaired ("DWI"). Defendant was indicted by a grand jury for habitual impaired driving on 22 August 2016. Defendant's case came on for trial in superior court on 25 April 2017. At trial, the State's evidence tended to show the following facts:

On 13 July 2016, at approximately 6:15 p.m., Sergeant David Scott Sluder was patrolling Park Street in Canton, North Carolina, when a blue sport utility vehicle passed him going 33 miles per hour in a 20 mile per hour zone. One of the SUV's brake lights was not functioning. Sergeant Sluder activated his blue lights to initiate a traffic stop, and the vehicle pulled into a restaurant parking lot. Sergeant Sluder approached the driver's window and encountered Defendant in the driver's seat. When Sergeant Sluder asked for Defendant's driver's license, Defendant replied that he did not have a license and began looking through his wallet. Defendant eventually handed Sergeant Sluder his wallet, which Sergeant Sluder understood to mean that Defendant was giving him permission to look for identification.

As Sergeant Sluder searched the wallet, he noticed the odor of alcohol coming from inside the vehicle. When he asked Defendant about the smell, Defendant replied, "I really screwed up. I've had two beers." Noting Defendant's "bloodshot and glassy" eyes, Sergeant Sluder asked Defendant to take a series of field sobriety tests. Sergeant Sluder asked Defendant to recite the alphabet from the letter E through the

letter P, but Defendant began with the letter I and ended with P. Defendant did successfully count his fingers with his thumb when asked. When Sergeant Sluder asked Defendant to submit to a breath test using an Alco-Sensor field screening device, Defendant declined, stating, "I'll be above the limit."

Sergeant Sluder next asked Defendant to hold his hands at his sides and walk heel to toe along a white line in the parking lot while counting his steps out loud until he reached nine steps, then turn around in a series of small steps and take nine steps back. Defendant started his count at two, rather than one as he had been instructed, and only took eight steps down the line. Defendant "wobbled a little bit side to side" as he performed this test. He then pivoted about-face, rather than turning in a series of small steps as instructed, and then missed heel to toe on the first step returning. Next, Sergeant Sluder asked Defendant to stand on one leg with his other foot raised six inches off the ground, while looking at his foot and keeping his hands at his sides, counting out loud to thirty. Defendant kept his foot about three inches off the ground, did not look at his foot while counting, and "wobbled from side to side" as he completed the task.

As a final test, Sergeant Sluder asked Defendant to stand with his hands to his sides, index fingers pointed with his head tilted back as far as he could with eyes closed, and to use the tip of his finger to touch the tip of his nose when instructed. Several times Defendant missed the tip of his nose, initially touching his lip or

columella (the bridge of tissue separating the nostrils) with the side of his finger before moving his finger over to the tip of his nose. Based on his observations, conversations with Defendant, and assessment of Defendant's performance on the field sobriety tests, Sergeant Sluder formed the opinion that Defendant's mental and physical faculties were appreciably impaired by alcohol.

Sergeant Sluder placed Defendant under arrest and transported him to the Haywood County Detention Center. He asked Defendant if he would submit to an intoximeter test to determine his blood alcohol concentration, but Defendant refused. Sergeant Sluder asked Defendant whether, in his own opinion, Defendant should have been operating a vehicle and Defendant said, "No."

At the close of the State's evidence, Defendant moved to dismiss the charge of impaired driving, which the trial court denied. Defendant then chose to testify, stating that he had left work at approximately 5:00 p.m. on 13 July 2016 and stopped at the liquor store to buy a pint of Crown Royal. He poured "about a shot and a half, maybe two shots" into a coffee cup, and took "[o]ne big drink and probably another little sip." He had not eaten anything since 8:30 that morning. Defendant declined the breath tests because he did not trust their accuracy. Defendant testified that he was not impaired at the time of the stop.

On 27 April 2017, the jury found Defendant guilty of driving while impaired. Defendant then pleaded guilty to habitual driving while impaired and driving while

license revoked. The trial court consolidated the convictions for judgment and sentenced Defendant to 21 to 35 months in the custody of the North Carolina Division of Adult Correction. After failing to give notice of appeal, Defendant petitioned this Court to issue a writ of certiorari, which was allowed by order dated 16 March 2018.

**Discussion**

On appeal, Defendant contends that he received ineffective assistance of counsel when his trial counsel failed to renew the motion to dismiss at the close of all evidence, and that he was prejudiced thereby. We disagree.

"A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel." *State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017). In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012). "If this Court 'can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different,' we do not determine if counsel's performance was actually deficient." *State v. Frazier*, 142 N.C. App. 361, 368, 542 S.E.2d 682, 687 (2001) (quoting *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985)).

"The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley,* 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). Where "there is substantial evidence of each essential element of the offense charged" and of defendant's identity as the perpetrator, the trial court correctly denies a motion to dismiss. *Id.* Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (internal quotation marks and citations omitted).

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." *State v. Benson,* 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted). "[C]ontradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *Id.* (internal quotation marks and citation omitted). In ruling on a motion to dismiss, "the defendant's evidence should be disregarded unless it is favorable to the State or it does not conflict with the State's evidence." *State v. Scott,* 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002).

The offense of DWI may be shown where the State proves that the defendant drove a vehicle upon a highway, street, or public vehicular area while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1(a)(1) (2017). In this case, there is no dispute that Defendant was driving his vehicle on a street, highway,

or public vehicular area, satisfying the first element of impaired driving. Therefore, our review is limited to whether the State presented sufficient evidence of Defendant's impairment.

"Before [a] defendant can be convicted under N.C. Gen. Stat. § 20-138.1(a)(1), the State must prove beyond a reasonable doubt that defendant had ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired." *State v. Phillips,* 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997). "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." *State v. Gregory,* 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002). Furthermore, refusal to submit to an intoxilyzer test is admissible as substantive evidence of guilt on a DWI offense. *Id.*; N.C. Gen. Stat. § 20-139.1(f). Other evidence of impairment may include slurred speech, red or glassy eyes, or staggering or unsteadiness while walking or standing. *Gregory*, 154 N.C. App. at 721, 572 S.E.2d at 840. "[T]he [f]act that a motorist has been drinking, when considered in connection with . . . other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show" the offense of DWI. *Atkins v. Moye,* 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970) (citation and internal quotation marks omitted).

We hold that there is no reasonable probability that the trial court would have granted Defendant's motion to dismiss had defense counsel renewed the motion to dismiss at the close of all evidence. It is undisputed that Defendant drank alcohol shortly before he was stopped by Sergeant Sluder. Sergeant Sluder observed Defendant with red and glassy eyes and smelled an odor of alcohol inside the vehicle. Defendant failed to perform tasks requested of him during several field sobriety tests, including reciting the alphabet from E to P, touching the tip of his nose with the tip of his finger, and taking nine steps down a line and back. Defendant was wobbly while performing the latter two tests. Defendant refused an intoxilyzer test, telling Sergeant Sluder that the result would show he was "over the limit." Sergeant Sluder formed the opinion that Defendant was appreciably impaired based on the above. This evidence was sufficient for a jury to find beyond a reasonable doubt that Defendant committed the offense of DWI.

While Defendant notes the absence of other factors indicating appreciable impairment, such as swerving while driving or slurred speech, the absence of these factors does not bear on the question of whether the evidence of impairment that was presented was sufficient to carry the case to the jury. *See State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56 ("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."), *cert. denied*, 531 U.S. 890, 148

L. Ed. 2d 150 (2000). Moreover, Defendant does not point to any evidence he presented that could have negatively affected the determination that substantial evidence existed to establish Defendant's impairment. Defense counsel's failure to renew his motion to dismiss at the close of all evidence did not prejudice Defendant. As a result, we conclude Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges STROUD and BERGER concur.

Report per Rule 30(e).