IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-704

Filed: 7 April 2020

Gaston County, No. 13CRS051884

STATE OF NORTH CAROLINA

v.

SANDRA SHAW HENRY, Defendant.

Appeal by Defendant from judgment entered 24 April 2019 by Judge Robert C. Ervin in Gaston County Superior Court. Heard in the Court of Appeals 4 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Lee J. Miller, for the State.

Arnold & Smith, PLLC, by Paul A. Tharp, for Defendant-Appellant.

DILLON, Judge.

Defendant Sandra Shaw Henry appeals from a judgment finding her guilty of driving while impaired ("DWI"). After careful review, we find no error.

I. Background

This matter came on for a jury trial in superior court. The State's evidence consisted largely of the testimony of the arresting officer and tended to show as

follows: In the early morning of Saturday, 16 February 2013, a Gastonia police officer received a call for service for a vehicle that had driven into a ditch in Gastonia. When the officer arrived on scene, he found a vehicle with its lights on, 15-20 feet perpendicular to the road. He found Defendant sitting in the driver's seat of the vehicle with no passengers inside. The engine of the vehicle was not running. He testified that "it didn't seem like the vehicle was sitting there long. There wasn't any dew on it or anything like that."

Defendant told the officer that she worked as a waitress at a restaurant and that she had "gotten sleepy while she was driving and that must have caused her to turn off the road." She admitted to him that she had consumed several drinks earlier in the night. The officer noticed that Defendant had slightly slurred speech and bloodshot glassy eyes while they spoke. After Defendant exited the vehicle, she was steady on her feet, but the officer noticed a faint odor of alcohol on her breath.

The officer conducted a portable breath test on Defendant, and the result was positive. He did not conduct any further field sobriety tests. Defendant was arrested and charged with driving while impaired. She agreed to submit to an Intoximeter test; her blood alcohol concentration ("BAC") was 0.11g/210L. Defendant moved to dismiss the charge; however, this motion was denied.

Defendant testified on her own behalf, contradicting some of the officer's testimony. For instance, she testified that *after* driving her car into a ditch, she drank

three promotional samples of liquor she had been given at work while waiting for a tow truck. Defendant renewed her motion to dismiss, which was also denied.

The jury found Defendant guilty, and the trial court sentenced her to sixty days in the custody of the misdemeanor confinement program, suspended for twelve months of unsupervised probation. Defendant timely appealed.

II. Analysis

On appeal, Defendant argues that the trial court erred when it denied her motion to dismiss. Specifically, she makes an evidentiary argument and a constitutional argument. We address each argument in turn.

A. Defendant's Motion to Dismiss Based on Insufficiency of Evidence

Defendant first argues that the trial court erred when it denied her motion to dismiss "where the State failed to present substantial evidence that Defendant was appreciably impaired, or, in the alternative, where the State failed to demonstrate that Defendant operated a motor vehicle after drinking a sufficient quantity of alcohol to become appreciably impaired."

We review a trial court's denial of a defendant's motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).

In deciding the motion, "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).

Our Court has held that where the "defendant pulled into a handicap spot, [the officer] noticed a moderate odor of alcohol coming from defendant's breath, defendant had red and glassy eyes, defendant admitted to consuming alcohol hours before [and the officer] believed that defendant was impaired[,]" the evidence was sufficient to deny the defendant's motion to dismiss. *State v. Lindsey,* 249 N.C. App. 516, 526, 791 S.E.2d 496, 503 (2016). Further, "[a]n intoxilyzer test and field sobriety tests are not required to establish a defendant's faculties as being appreciably impaired[.]" *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002).

Here, resolving any contradictions in the State's favor, *see State v. Rose*, 339 N.C. at 192, 451 S.E.2d at 223, the State presented substantial evidence that Defendant was appreciably impaired. The evidence, in the light most favorable to the State, showed that Defendant admitted to the officer to drinking several drinks earlier in the night; that she had red, glassy eyes; that she had driven her car into a ditch; and that her breath smelled of alcohol. Finally, the officer testified to his opinion that Defendant was appreciably impaired. Thus, the trial court correctly denied Defendant's motion to dismiss. This was properly a question for the jury.

As to Defendant's alternative argument, there was conflicting evidence about whether Defendant was sitting in the driver's seat of the vehicle. The officer testified

that he found Defendant in the driver's seat. He testified that Defendant admitted to drinking several drinks earlier that night before driving and that she had fallen asleep at the wheel. Defendant, though, testified that she was not in the vehicle.

Viewing the evidence in the light most favorable to the State, the evidence showed that Defendant was sitting in the driver's seat when the officer arrived on the scene and that she had admitted to drinking earlier in the night. Further, Defendant's admission to falling asleep while driving evidences her operation of the vehicle. Thus, the State adequately demonstrated that Defendant operated a motor vehicle after drinking a sufficient quantity of alcohol to become appreciably impaired. The trial court correctly denied Defendant's motion to dismiss.

B. Privilege Against Self-Incrimination

Defendant next argues that the admission of testimony regarding Defendant's invocation of her privilege against self-incrimination and the State's arguments regarding Defendant's silence in its closing argument violated her rights under our state and federal constitutions. We disagree.

In order to preserve an issue for our review,

> a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). Further, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

Defendant argues that at two points during trial her constitutional rights were violated: during the prosecutor's cross-examination of her and during the prosecutor's closing argument. During cross-examination, the prosecutor asked:

> Q. Do you recall him asking you about alcohol consumption?
>
> A. Yes, sir.
>
> Q. What did you tell him?
>
> A. I answered the questions that he asked me.
> …
> Q. Did you at some point begin to suspect that he might be investigating this as a driving while impaired investigation?
>
> A. No, sir.
>
> Q. Even when he placed you under arrest for driving while impaired?
>
> A. I had no idea up until that point that the alcohol that I had consumed after the accident was – it was not a factor in the fact that I fell asleep while I was driving my car. So I answered the questions that he asked me directly truthfully.
> …
> Q. By the time he placed you under arrest for driving while impaired and at the time he took you to Officer Meek who put you under the Intoximeter and you had blown into the instrument. It comes back, and they show you the ticket

> and it shows blood alcohol concentration of .11, at any point during that interaction did it ever occur to you to say, wait a minute, guys, I drank four shots hard liquor in the parking lot before you got here?
>
> A. No. Because prior to that I was told anything I said without the presence of the attorney could be held against me. At that point, I didn't answer the questions. I had answered his questions up until that point truthfully. At that point, when he asked me to submit to a blood alcohol test, and I did. At that point, this was not relevant.
>
> Q. You didn't think it was relevant that you consumed hard liquor after the wreck when they are investigating you for driving while impaired?
>
> A. I didn't perceive it to be at that point that he was investigating me for driving while impaired.
>
> Q. Even when he placed you under arrest for it?
>
> A. When he read my rights and placed me under arrest, I certainly stopped answering questions and didn't offer any additional information.

During closing argument, the prosecutor then stated:

> [THE STATE:] You are being investigated for driving while impaired charge. You know that you had alcohol after your wreck. All of the alcohol actually. You have been chugging hard liquor in the Food Lion parking lot and the empties are in your boyfriend's truck tucked up in a towel under the seat. You may not realize you are being investigated for driving while impaired because you are impaired, your mental capacities aren't' completely there. But eventually, you then think, wait a minute, they think I committed a crime. What is the first thing you are going [to] say?
>
> [DEFENSE:] Objection.

> THE COURT: Overruled.
>
> [THE STATE:] … At that point, maybe it is a good time to say, wait a minute, guys, this sounds like you think I drank before I drove. But all my drinking was after. No. We don't hear that until years later when we are here in court. This is the first time this story has ever come out. It is not anywhere in the officer's notes and she testified I never told him any of this stuff. Why not? Because she didn't think it was a good idea to tell him, or maybe she thought of it now five years later, and this is the story.

While Defendant's counsel objected during the closing argument, counsel did not object during the cross-examination. At neither point did counsel raise a constitutional argument. Thus, it is inappropriate for us to review Defendant's constitutional argument on appellate review.

In the alternative, Defendant urges us to review this constitutional issue for plain error. Our Supreme Court has noted that we may review unpreserved constitutional issues for plain error "[p]ursuant to our authority under Rule 2 of the North Carolina Rules of Appellate Procedure to foreclose manifest injustice[.]" *State v. Wiley*, 355 N.C. 592, 624, 565 S.E.2d 22, 45 (2002). However, our Supreme Court has also stated that the plain error rule

> is always to be applied cautiously and only in the exceptional case where … it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such

> as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where "[the alleged error] had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

We decline to apply plain error review here. We note that, in any event, there was ample other evidence from which a jury could have found Defendant guilty, as outlined above.

III. Conclusion

We conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).