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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-168

Filed: 1 December 2020

Davidson County, No. 16 CRS 053938-40

STATE OF NORTH CAROLINA

v.

CHAD RAYNARD SHORE

Appeal by defendant from judgments entered 27 September 2019 by Judge Julia Lynn Gullett in Davidson County Superior Court. Heard in the Court of Appeals 17 November 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for the State.

Blass Law, PLLC, by Danielle Blass, for defendant-appellant.

TYSON, Judge.

Chad Raynard Shore (“Defendant”) appeals from a jury’s verdicts finding him guilty of driving while impaired, resisting a public officer, misdemeanor fleeing to elude arrest, and exceeding a safe speed. We find no error.

I. Background

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Davidson County Sherriff's Detective William David Blake ("Detective Blake") received a call complaining of a disturbance at a Sheetz, Inc. convenience store and gasoline station shortly after 7:00 a.m. on 16 July 2016. Detective Blake arrived wearing his Davidson County Sherriff's Department uniform and driving his marked patrol car. When Detective Blake pulled into the parking lot, he noticed a car located inside the drive-through car wash with clear walls and occupied by three individuals. Detective Blake noticed the car wash was not operating and the car was not wet.

When Detective Blake pulled into a parking space, he was met by a Sheetz employee. As Detective Blake was speaking with the employee, the car inside the car wash pulled out and circled the building and continued toward Detective Blake and the employee. Detective Blake identified the vehicle as a 1996 four door Acura and noticed at least three of the vehicle's windows were down.

Detective Blake stepped into the middle of the parking lot and motioned for Defendant to stop the car. Detective Blake wanted to speak with the occupants of the vehicle to see if they were involved in the disturbance that led to his dispatch.

The vehicle did not stop and continued traveling coming within a "few feet" of Detective Blake, which enabled him to identify Defendant as the driver of the vehicle. Defendant accelerated around Detective Blake, pulled through a parking space, across the parking lot and entered the southbound lane of old U.S. Highway 52.

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Detective Blake believed Defendant was “traveling at an unsafe speed inside of the parking lot and continued to do so once he pulled onto the road.”

Detective Blake entered his patrol car and activated the blue lights and sirens to pursue Defendant. Defendant continued to accelerate and Detective Blake followed behind Defendant’s vehicle “no more than a couple hundred feet” for most of the pursuit. During the pursuit, Defendant passed another vehicle in a no-passing zone. Detective Blake estimated Defendant was driving in excess of fifty-five to sixty miles per hours in a forty-five miles per hour zone.

Defendant’s vehicle entered the town of Welcome, where the speed limit decreased to thirty-five miles per hour, but Defendant continued to accelerate his vehicle. Defendant then “drastically decelerated,” turned into a parking lot, and stopped his car in the middle of the parking lot and not in a designated space. The distance from Sheetz to the parking lot where Defendant stopped was approximately two miles.

Detective Blake quickly exited his patrol car and drew his weapon. Defendant contemporaneously exited the vehicle, leaning on the door to exit. Detective Blake noticed Defendant was “noticeably unsteady on his feet.” When Detective Blake approached Defendant, he detected alcohol on Defendant’s breath, and observed bloodshot glassy eyes and “somewhat slurred speech.” Based upon Detective Blake’s

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training and experience, he believed the signs Defendant exhibited were characteristics of an impaired driver.

Detective Blake detained Defendant for further investigation by placing him in handcuffs. Detective Blake commenced to find out information about Defendant. While Detective led Defendant away from the car, Defendant stumbled and was unsteady on his feet. Detective Blake believed Defendant “had consumed a sufficient amount of alcohol to cause an appreciable impairment to his . . . mental or physical faculties.” Defendant was placed under arrest and transported to the Davidson County jail.

Defendant was provided an opportunity to make a telephone call and was read his rights pertaining to a blood-alcohol breath test. He was provided thirty minutes to obtain an attorney to observe the breath test. After thirty minutes had elapsed, and without any indication from Defendant that anyone was on the way, Detective Blake requested Defendant to submit to a breath test.

The intox ECR-2 Intoximeter machine measures the amount of alcohol in one’s body by detecting alcohol levels in a person’s breath. Detective Blake is a certified chemical analyst and qualified to administer breath tests. The Intoximeter requires a “deep lung sample” which requires a steady stream of breath into the machine. After instructions, Detective Blake provided Defendant three or four opportunities to submit a valid breath sample. Defendant was unable to provide a sample that was

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capable of being captured and registered by the Intoximeter. Detective Blake recorded these results as a refusal by Defendant to submit to the test.

Defendant was charged with driving while impaired, two counts of resisting a public officer, failure to heed to a light or siren, misdemeanor fleeing and eluding arrest, unsafe passing over a yellow line, and exceeding a safe speed.

Defendant was tried in district court and found guilty of driving while impaired, one count of resisting a public officer, misdemeanor fleeing to elude, and exceeding a safe speed on 1 March 2019. Defendant was found not guilty of failing to heed to a light or siren, and one count of resisting a public officer. The trial court dismissed the unsafe passing over a yellow line charge. Defendant gave written notice of appeal to superior court on 5 March 2019.

At his trial *de novo*, Defendant moved to dismiss all charges against him alleged the State had presented insufficient evidence to support the charges. Defendant renewed his motion to dismiss at the close of all evidence. The jury found Defendant guilty of driving while impaired, one count of resisting a public officer, misdemeanor fleeing to elude, and exceeding a safe speed.

For the driving while impaired conviction, Defendant was sentenced to 60 days in custody, suspended upon 12 months of supervised probation. The convictions of resisting a public officer, misdemeanor fleeing to elude, and exceeding a safe speed were consolidated for judgment. Defendant was sentenced to 120 days in custody,

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suspended upon 12 months of supervised probation. The sentences were ordered to run consecutively. Defendant gave oral notice of appeal.

II. Jurisdiction

Jurisdiction in this Court lies from a final judgment in the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court erred by failing to dismiss the driving while impaired count for insufficient evidence.

IV. Standard of Review

“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) (citation omitted). “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 (2000) (citations omitted).

“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

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contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

Defendant only challenges the sufficiency of the evidence of driving while impaired. In the absence of any argument to challenge his remaining convictions for resisting a public officer, misdemeanor fleeing to elude, and exceeding a safe speed, we find no error in those convictions and judgment. N.C. R. App. P. 28(a) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”).

V. Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss the charge of driving while impaired because insufficient evidence proves he was appreciably impaired.

Defendant was charged with driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1(a), which provides, in relevant part:

A person commits the offense of impaired driving if he drives 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) (2019).

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Our Court has held: “The essential elements of DWI are: (1) Defendant 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) (citation omitted).

A. Appreciable Impairment

Defendant challenges whether sufficient evidence of his appreciable impairment was presented to the court. Impairment occurs when the person has “ingested a sufficient quantity of an impairing substance to cause his facilities to be appreciably impaired.” *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) (citations omitted). “[A]n odor [of alcohol], *standing alone*, is no evidence that [a driver] is under the influence of an intoxicant.” *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970) (emphasis supplied).

“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.” *Gregory*, 154 N.C. App. at 721, 572 S.E.2d at 840 (emphasis supplied). An officer is not required to perform a breathalyzer test to determine if a defendant is under the influence of alcohol. *Id.* The refusal to submit to a breathalyzer test is evidence a defendant is guilty of driving while impaired. *Id.* (citation omitted).

B. Additional factors

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Detective Blake testified he observed Defendant driving carelessly, recklessly and aggressively before and during the chase. Detective Blake further testified Defendant had bloodshot and glassy eyes, slurred speech, and was “noticeably unsteady on his feet.”

Defendant also failed to follow the instructions of the breathalyzer operator by not providing a sufficient “deep lung sample,” despite being instructed and given at least three attempts to do so. When a defendant fails to follow an officer’s instructions by failing to blow properly a defendant is considered to have willfully refused to submit to a chemical analysis. *Tedder v. Hodges*, 119 N.C. App. 169, 175, 457 S.E.2d 881, 885 (1995) (citation omitted). Viewed in the light most favorable to the State, sufficient evidence was admitted to survive Defendant’s motion to dismiss. Defendant’s argument is overruled.

VI. Conclusion

The State presented substantial evidence of each essential element of driving while impaired. The trial court did not err by denying Defendant’s motion to dismiss. Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury’s verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges STROUD and HAMPSON concur.

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Report per Rule 30(e).