STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2012-212931

THE STATE,

Respondent,

vs.

DAISY LYNNE MIMMS,

Appellant.

FINAL BRIEF OF RESPONDENT

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Attorney General

SALLEY W. ELLIOTT
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES

I. DID THE CIRCUIT COURT CORRECTLY AFFIRM THE MAGISRATE'S REFUSAL TO CHARGE CRIMINAL INTENT BECAUSE S.C. CODE ANN. § 56-5-2930 IS A STRICT LIABILITY STATUTE?

II. DID THE CIRCUIT COURT CORRECTLY AFFIRM THE DENIAL OF THE MOTION FOR DIRECTED VERDICT BECAUSE THE STATE PRESENTED SUFFICIENT EVIDENCE OF APPELLANT'S GUILT, INCLUDING TROOPER BURRIS' TESTIMONY APPELLANT DROVE ERRATICALLY, THAT HER CAR SMELLED STRONGLY OF ALCOHOL, THAT APPELLANT COULD NOT MAINTAIN HER BALANCE, THAT SHE FAILED A FIELD SOBRIETY TEST, AND APPELLANT'S APPEARANCE AND MANNERISMS WERE CONSISTENT WITH IMPAIRMENT?

STATEMENT OF THE CASE

The State charged Appellant Daisy Lynn Mimms with driving while under the influence ("DUI"), first offense, pursuant to S.C. Code Ann. § 56-5-2930 (2006). (R. p.4[Uniform Traffic Ticket]). On April 11, 2011, Appellant was tried in the Magistrate's Court of Orangeburg County before the Honorable Meree D. Williamson. (R. p.2 [Magistrate's Return, p. 2]). Appellant was represented at trial by Assistant Public Defender Mark Wise. The jury found Appellant guilty of DUI, and the Judge Williamson sentenced her to a 30 day sentence suspended upon payment of a fine of $997.00. (R. p.3; R. p.26[Magistrate's Return, p. 3 and Attachment IV - Jury Verdict Form). A Notice of Appeal was filed on April 21, 2011. (R. p.27 [Attachment V of Magistrate's Return]). The appeal to the circuit court was heard by the Honorable Edgar W. Dickson on January 5, 2012. (R. p.32) Mr. Wise again represented Appellant, and Assistant Solicitor Anne Hutto represented the State. Id. Judge Dickson issued an Order dated September 6, 2012, finding that there were no legal or factual grounds constituting error on the part of the magistrate and dismissing the appeal with prejudice. (R. p.53 [Circuit Court Order dated September 6, 2012]). Appellant filed and served notice of appeal dated September 14, 2012. Appellant filed and served her brief and this brief of Respondent follows.

STATEMENT OF FACTS

The trial summary of the facts in the Magistrate's Return is as follows:

> The State's only witness was Trooper Jamie Burris. After being sworn Burris stated that he was responding to a dispatch call to look out for a driver who was reported driving erratically. Trooper Burris saw a car fitting the description and upon coming off the ramp onto the interstate the vehicle ran off the roadway. The trooper proceeded with the traffic stop. The trooper stated he smelled a strong odor of alcohol and proceeded to have the defendant get out of the car. The roadside video was put into evidence and the horizontal gaze nystagmus test was performed. Burris stated that the defendant was unable to keep her balance and felt the roadside was unsafe to administer any further field sobriety tests. The trooper stated that by the defendant's mannerisms and appearance she appeared to be under the influence of alcohol. He also stated that the defendant did tell him she was also taking medication. The video tape included testimony by the defendant that she had consumed alcohol and that she has cancer. Upon cross-examination the trooper explained in detail the tree elements used in the HGN test to determine if the defendant was under the influence.
> (R. p.30 [Magistrate's Return, p. 9]).

Notably, the audio transcript of Trooper Burris' testimony at trial reveals that Appellant did not successfully complete the horizontal gaze nystagmus test and, that based upon his lengthy experience and training as well as Appellant's appearance and mannerisms and the totality of the circumstances, Appellant was driving her vehicle while impaired. Trooper Burris stated that he saw Appellant drive her vehicle off the roadway as he responded to the dispatch call about an erratic driving. ([Magistrate Audio Transcript transported and filed seperatly]). He also narrated for the jury when the video recording from his patrol car was presented at trial "You just saw her going off the roadway right there?" ([Magistrate Audio Transcript transported and filed seperatly]). After pulling Appellant over, Trooper Burris said "You was weaving all over the roadway!" [Magistrate Audio Transcript transported and filed seperatly]). He also testified about the enhanced or synergy effect that can arise when alcohol is consumed in combination with medication. Appellant presented no evidence at trial. ([Magistrate Audio Transcript transported and filed seperatly]).

ARGUMENTS

I.

The Circuit Court correctly affirmed the Magistrate's refusal to charge criminal intent because S.C. Code Ann. § 56-5-2930 is a strict liability statute

Appellant claims the magistrate erred by refusing her request to charge the jury on criminal intent and in finding that S.C. Code Ann. § 56-5-2930 provides for strict liability. On appeal to the circuit court, Appellant argued that in instances where a defendant consumed only one beer in addition to taking medication, the State should be required to establish and the court must charge the jury that the defendant knew that the combination of alcohol and drugs would impact her ability to drive before she could be convicted. Relying on Morrisette v. United States, 342 U.S. 246 (1952) and State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990), Appellant argued on appeal to the circuit court that mere silence of the statute as to *mens rea* does not mean the requirement is eliminated and that the magistrate judge erred in refusing to provide the requested jury charge even though S.C. Code Ann. § 56-5-2930 does not specifically provide for it. The State submits that the magistrate judge correctly refused the requested jury charge and the circuit court properly affirmed the conviction and dismissed the appeal. S.C. Code Ann. § 56-5-2930 provides for strict liability.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An appellate court will not reverse a trial court's ruling absent a prejudicial abuse of discretion. State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial court's decision lacks evidentiary support or is controlled by an error of law. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002).

"Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind [and] an evil doing hand; although this court has recognized that the legislature may declare an act criminal regardless of the mental state of the actor." State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994), citing State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990); State v. Manor, 179 S.C. 45, 183 S.E. 582 (1936). Our legislature can make a particular crime a strict liability offense. Id; see e.g. State v. Kirkland, 282S.C. 14, 317 S.E.2d 444 (1984). "[S]trict liability offenses or absolute liability offenses depend on no mental element, but consist only of forbidden acts or omissions. Strict liability allows for criminal liability absent the element of mens rea found in the definition of most crimes. To prove a violation of a strict liability statute, the state need only prove the accused engaged in a voluntary act or an omission . . . ." 21 Am. Jur. 2d Criminal Law section 132. A per se violation or strict liability crime is one which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent. State v. Harrison, 846 P. 2d 1082 (New Mexico 1993). In effect, the legislature forbids the act and makes its commission criminal without regard to intent of the defendant. Id. The rationale for strict liability statutes is that the public interest in the area governed by the statute is so compelling or the harm caused so great that the public interest outweighs the interests of the individual charged. Id.; State v. Rios, 980 P. 2d 1068 (N.M.1999).

Whether an offense is one of strict liability is a question of legislative intent. State v. Jefferies, 316 S.C. at 13. In Jefferies, our supreme court indicated that when the statute does not expressly state whether a *mens rea* is required, the court looks to the common law and development of the statute to determine whether the legislature intended the crime to require a *mens rea*. See also Morrisette v. United States, 342 U.S. 246 (1952).

The primary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). "Whenever possible, legislative intent should be found in the plain language of the statute itself. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008).

S.C. Code Ann. § 56-5-2930 states "It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that a person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances . . . . A person who violates the provisions of this section is guilty of the offense of driving under the influence . . . ."

The State submits that nothing in the plain language suggests anything but strict liability. Also, a review of the legislative enactments pertaining to this statute suggested anything but strict liability. See S.C. Code Ann. § 46-343 (1952); S.C. Code Ann. § 46-343 (Supp. 1960); S.C. Code Ann. § 46-343 (1962); S.C. Code Ann. § 56-5-2930 (Supp. 1987); S.C. Code Ann. § 56-5-2930 (Supp. 1998); S.C. Code Ann. § 56-5-2930 (Supp. 2000); S.C. Code Ann. § 56-5-2930 (Supp. 2008). Further, no case law in South Carolina suggests § 56-5-2930 is anything but a strict liability statute. See State v. Long, 186 S.C. 439, 195 S.E.2d 624 (1938) and State v. Mouzon, 231 S.C. 655, 9 S.E.2d 672 (1957), in which our courts concluded that driving under the influence is ***malum prohibitum*** and *malum in se*. The intent for *malum prohibitum* is simply the intent to do the act which results in a violation of the law. Crossley v.State, 582 S.E.2d 204

(Ga.App. 2003). Unlike with the crime of kidnapping where the common law and development of the kidnapping statute reveals the legislative intent that the *mens rea* of "knowledge" is required, the rationale, purpose and development of the law respecting DUI differs. See State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994).

The statute in question clearly provides that the only proof necessary is evidence that a defendant was driving a vehicle under the influence of alcohol and/or drugs or other substances and that the defendant's faculties were materially and appreciably impaired. Our courts have repeatedly recognized that the corpus delicti of driving under the influence is established by proof that a person is driving a vehicle while materially and appreciably impaired and the impairment is caused by the use of alcohol, drugs, or other substances or a combination thereof. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) and S.C. Code Ann. section 56-5-2930; see also State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003); State v. Russell, 345 S.C. 128, 546 S.E.2d 202(Ct. App. 2001); State v. McCombs, 335 S.C. 123, 515 S.E.2d 547 (Ct. App. 1999); State v. Townsend, 321 S.C. 55, 467 S.E2d 138 (1996); State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 (1966).

The State also submits that our legislature recognized the public interest in deterring intoxicated individuals from driving motor vehicles while materially and appreciably impaired to protect the drivers, the innocent individuals who are injured and killed by these drivers and the families and loved ones of innocent victims and enacted the statute without requiring proof of intent to secure a conviction for violating the statute. See State v. Harrison, 846 P.2d 1082 (N.M. 1993); City of Wichita v. Hull, 724 P.2d 699 (Kan. 1986). Our supreme court recognized this legislative intent and public policy in State v. Long, 186 S.C. 439, 195 S.E.2d 624, 627 (1938), when it concluded:

> "the purpose of the statute is to prevent accidents and preserve person from injury, and the reason for it is that an intoxicated person has so befuddled and obscured his faculties of perception, judgment, and recognition of obligation toward his fellows as to be a menace in guiding the instrumentality so speedy and high-powered as a modern automobile. Such a man is barred from the highway because he has committed the wrong of getting drunk and thereby has rendered himself unsafe to propel and guide a vehicle capable of the speed of an express train and requiring its operation to be in possession of his faculties."

See also Dixon v. Weir Fuel Co., 251 S.C. 74, 160 S.E.2d 194 (1968) ("One violates the traffic statute if he partakes of alcohol to the extent that he cannot drive a motor vehicle with reasonable care, or if he cannot drive as a prudent driver would operate a vehicle."). Other jurisdictions have construed driving under the influence statutes as strict liability offenses for these reasons. State v. Zaragoza, 209 P.2d 629 (Az. 2009); State v. Young, 795 P. 2d 285 (Haw.App. 1990); People v. Thorson, 496 N.E.2d 304(Ill. 1986); Burns v. State, 556 N.E.2d 955 (Ind.Ct.App. 1990); City of Wichita v. Hull, 724 P.2d 699 (Kan. 1986); State v. McDole, 734 P.2d 683 (1987); City of Defiance v. Kretz, 573 N.E.2d 2(Ohio 1991); State v. Miller, 788 P.2d 974 (Or. 1990); State v. Polk, 927 A.2d 514 (N.H. 2007); State v. Sims, 236 P.3d (N.M. 2010); State v. Bernhardt, 584 A.2d 854 (N.J. 1991); State v. Glass, 620 N.W.2d 146 N.D. 2000); State v. Kain, 24 S.W.3d 816 (Tenn. 2000); State v. Carter, 810 S.W.2d 197 (Tex.Crim.App. 1001); State v. Caibaiosai, 363 N.W.2d 574(Wis. 1985); see also Begay v. United States, 553 U.S. 137 (2008) (stating that statutes that forbid driving under the influence are strict liability crimes).

The charge requested by Appellant would defeat the public policy, obstruct the purpose of the statute, and lead to an absurd result that would allow a defendant to argue that his intentional consumption of alcohol or other substances impaired his ability to

know he was impaired or to form conscious intent to drive drunk. State v. Williams, 698 P.2d 732 (Az. 1985); see Morrisette v. United States, 342 U.S. 246 (1952). The requested charge is also inconsistent with the longstanding precedent that voluntary intoxication does not relieve an individual from criminal responsibility. State v. South, 310 S.C. 504, 427 S.E2d 666 (1993); State v. Hartfield, 300 S.C. 469, 388 S.E.2d 802 (1990); see also State v. Gurule, 252 P.2d 823 (N.M. 2011).

The State also notes that the right to operate a motor vehicle on a public highway in South Carolina is not a property right but is merely a privilege subject to reasonable regulation under the police power in the interest of the public safety and welfare. Chisolm v. S.C. Dept. Motor Vehicles, 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013). South Carolina has a substantial interest in protecting its citizens from the injury, death and harm caused by individuals who drive vehicles while materially and appreciably impaired by alcohol, drugs, other substance or combination thereof. The statute as enacted promotes the health, safety and welfare of the citizens of South Carolina and was clearly intended as a strict liability offense to accomplish these goals.

Moreover, a reading of the statute as a whole reflects further legislative intent that the offense is one of strict liability. Subparts I and J of the statute which set forth certain factors a defendant may challenge or introduce when charged and tried for the offense does not include the factor which formed the basis for the requested charge. See City of Camden, 326 S.C. 556, 486 S.E.2d 492 (1997)(stating that in construing a statute, the court looks to it language as a whole in light of its manifest purpose and stating that driving while intoxicated is a traffic offense).

Lastly, if this Court determines intent is required, the wording of the statute makes the **act of driving** a motor vehicle within the State after consuming alcohol, drugs or other substances the gravamen of the offense. State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (1996). Therefore any charge respecting intent would be limited to Appellant's the intent to drive after imbibing some amount of these substances. Any error in failing to give this charge is harmless because there is no question in this case Appellant consumed alcohol and was on medication and made a conscious decision to drive the vehicle. State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (1998).

The Magistrate Judge correctly ascertained and effectuated the intent of the legislature, as required. Pittman, 373 S.C. at 561, 647 S.E.2d at 161. Because § 56-5-2930 is a strict liability statute in which intent is not required, the Magistrate Judge correctly denied the request to charge. Appellant's conviction must be affirmed. City of Orangeburg v. Carter, 303 S.C. 290, 400 S.E2d 140 (1991) (stating the trial judge properly charged the jury that "DUI is established by proof the defendant's ability to drive was materially and appreciably impaired.").

II.

The Circuit Court correctly affirmed the denial of the motion for directed verdict because the State presented sufficient evidence of Appellant's guilt, including Trooper Burris' testimony Appellant drove erratically, that her car smelled strongly of alcohol, that Appellant could not maintain her balance that she failed a field sobriety test, and Appellant's appearance and mannerisms were consistent with impairment.

Appellant claims that the Magistrate's Court failed to grant her motion for directed verdict because one swerve in and out of a lane is insufficient to show impaired driving. (Appellant's Brief 3-4.) Appellant ignores all of the other evidence and testimony that Appellant was impaired while driving, and therefore the magistrate judge correctly denied the motion for directed verdict.

A. Insufficient Record

It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence. E.g. Ex Parte Morris, 367 S.C. 56, 624 S.E.2d 649 (2006); McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (appellate courts repeatedly have held "that statements of fact appearing only in arguments of counsel will not be considered"); S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct.App.2003) ("[a]rguments made by counsel are not evidence"). The burden is on appellant to provide a sufficient record for review. E.g, State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998).

Appellant claims that "[Trooper Burris] saw the vehicle veer outside of the lane of travel, crossing the white line on the right side of the roadway but not leaving the paved portion of the roadway, and then return to the travel lanes [Circuit Court Transcript 4, lines 16-18]." (Brief of Appellant 1.) Appellant then argues that "The testimony was unequivocal that [Appellant] only left the main lane of travel on one occasion when she traveled over the white line on the right

side of the roadway. She never left the paved portion of the roadway and never veered over the yellow line on the left side of her lane." (Brief of Appellant 3.)

The Magistrate's Return does not contain this detailed information. (See R. p. 30 [Magistrate's Return, p 9]). Instead, Appellant cites counsel's oral argument to the circuit court on appeal, where defense counsel stated "[a]t trial the evidence was that Trooper Burris was behind [Appellant] and observed the right wheels of her vehicle veer out of her lane of travel and then back into her lane, but that occurred one time and then he pulled her over." (R. p.35 Circuit Ct. Transcript 4, lines 16-18.) While other statements by Trooper Burris exist, none of them prove Appellant's claim that she only went over a white line once. See (Magistrate Audio Transcript) (Burris states that as he was coming up behind, she ran off the roadway); (Magistrate Audio Transcript) (Narration during video, "You just saw her going off the roadway right there?"); (Magistrate Audio Transcript) ("You was weavin' all over the roadway!").

The only evidence Appellant presents is the statement of her attorney of what happened in the video. Since a single statement by an attorney does not create a sufficient factual record for review, and the burden is on Appellant to provide a sufficient record for review, this Court should dismiss the issue. Mitchell, 330 S.C. at 194, 498 S.E.2d at 644. Moreover, the swerve the trooper observed provided the basis for the traffic stop which led to other evidence that was presented as to Appellant's impairment. See State v. Parker, 271 S.C. 159, 237 S.E.2d 584 (1978)(officer's personal observation that defendant failed to maintain his lane was sufficient to justify the traffic stop and arrest); State v. Vinson, 400 S.C. 347, 734 S.E.2d 182 (Ct. App. 2012) (stating that trooper was justified in stopping defendant for perceived violation of statute requiring driver to remain within their lane when defendant's front tire crossed one time into the area between the double yellow lines that separated opposing lanes).

B. Directed Verdict

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in a light most favorable to the State. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). An appellate court must find a case is properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648.

Here, the State presented sufficient evidence that, viewed in the light most favorable to the State, shows Appellant drove a vehicle while impaired within the meaning of S.C. Code Ann. section 56-5-2930. First, Trooper Burris testified that when responding to a dispatch about a person driving erratically on I-26, he observed Appellant's vehicle which matched the description of the vehicle in the dispatch call. As Trooper Burris followed the vehicle, he observed Appellant drive the vehicle off of the roadway. (R p.30 [Magistrate's Return – Attachment VI]; Audiotape of trial). Trooper Burris initiated a traffic stop and, upon approaching the passenger window of Appellant's vehicle, smelled a strong odor of alcohol from the window of the car. Id. Third, Trooper Burris testified that Appellant was unable to keep her balance while performing the sobriety tests. Id. Fourth, Trooper Burris was so concerned with Appellant's performance that he believed it was unsafe to administer any further field sobriety tests. Id. Fifth, Appellant did not successfully complete the horizontal gaze nystagmus test. (Magistrate Audio Transcript transported and filed seperatly). Sixth, Trooper Burris concluded

that, based upon his training, experience, Appellant's mannerisms and appearance, and the totality of the circumstances, Appellant was operating her vehicle while under the influence and impaired. Id. Trooper Burris specifically testified at trial that crossing the line of the roadway is not the only proof that Appellant was driving under the influence. Id. The video tape of the incident site also contained Appellant's admission of consuming alcohol and medication. Id.

Appellant only contests the nature of one item of evidence: the erratic driving. (Brief of Appellant 3-4.) However, that one factor cannot be viewed in isolation. The review for directed verdict includes all of the evidence presented and taken in the light most favorable to the State. Because the record before this Court contains sufficient evidence tending to prove that Appellant was impaired while driving within the meaning of the statute, the judge properly denied the motion for directed verdict. See State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001); State v. Parker, 271 S.C. 159, 245 S.E.2d 904 (1978); State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964); State v. Breech, 308 S.C. 356, 417 S.E.2d 873 (1992). This Court should affirm.

CONCLUSION

For the reasons stated above, this Court should affirm the conviction.

Respectfully submitted,

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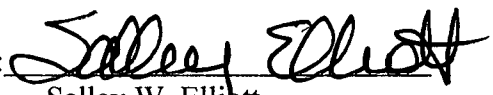
BY: 
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CERTIFICATE OF COUNSEL

The Undersigned certifies that this Final Brief of Respondent complies with Eule 211(b), SCACR.

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