STATE V. MITCHELL

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CLIFFORD MITCHELL,
Defendant-Appellant.

NO. 31,483

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

January 5, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Ross C. Sanchez, District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Jacqueline L. Cooper, Chief Public Defender, Santa Fe, NM, Linda Yen, Assistant Appellate Defender, Albuquerque, NM, for Appellant

JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, TIMOTHY L. GARCIA, Judge

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

Defendant appeals from the district court's affirmance of his convictions for DWI (first offense), no insurance, and no driver's license. [RP 82] Our notice proposed to affirm

and Defendant filed a timely memorandum in opposition. We remain unpersuaded by Defendant's arguments and therefore affirm.

Defendant was convicted of DWI pursuant to the portion of the statute which prohibits driving while impaired to the slightest degree. *See* NMSA 1978, § 66-8-102(A) (2010); *see also State v. Dutchover*, 85 N.M. 72, 73, 509 P.2d 264, 265 (Ct. App. 1973) (observing that DUI may be established through evidence that the defendant's ability to drive was impaired to the slightest degree).

Defendant specifically challenges the sufficiency of the evidence to support his DWI conviction. [DS 6; MIO 5] As detailed in our notice, an officer stopped Defendant's vehicle after he noticed, on three occasions, the vehicle drifting into other lanes of traffic before pulling back into its own lane. [RP 78; DS 1] After the officer stopped the vehicle and identified Defendant as the driver [RP 78; DS 2], he noticed that Defendant emitted an odor of alcohol, and had bloodshot and watery eyes. [RP 78; DS 2] Defendant admitted that he had consumed an alcoholic beverage. [RP 79] The officer then administered field sobriety tests to Defendant [RP 79], and Defendant performed in a manner consistent with being under the influence of intoxicating liquor within the meaning of Section 66-8-102(A). [RP 79; DS 3]

We hold that the fact finder could reasonably rely on the foregoing behavioral evidence to convict Defendant for DWI. *See State v. Sparks*, 102 N.M. 317, 320, 694 P.2d 1382, 1385 (Ct. App. 1985) (defining substantial evidence as that evidence which a reasonable person would consider adequate to support a defendant's conviction); *see also State v. Gutierrez*, 1996-NMCA-001, ¶ 4, 121 N.M. 191, 909 P.2d 751 (upholding a DWI conviction based on behavior evidence when the defendant smelled of alcohol, had bloodshot and watery eyes, failed field sobriety tests, admitted to drinking alcohol, and the defendant's vehicle was weaving into other traffic lanes).

We acknowledge Defendant's continued arguments that countervailing considerations – his breath tests showed readings within the legal limits of .05 and .06 [MIO 4-5]; the calibration check on the test result was .082, which is higher than .08 [MIO 6]; the officer only detected a "fair" odor of alcohol on his breath, rather than moderate or strong [DS 5; MIO 6]; his driving did not affect any other traffic [MIO 7]; and his performance on the field sobriety tests was not entirely unsuccessful [MIO 7] – undermine the sufficiency of the State's evidence to establish that he was impaired. [MIO 6-7] However, Defendant's arguments amount to an invitation to re-weigh the evidence, which we cannot do. *See generally State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (observing that the evidence must be viewed "in the light most favorable to the state," and that the reviewing court "does not weigh the evidence and may not substitute its judgment for that of the fact finder"); *see also State v. Foxen*, 2001-NMCA-061, ¶ 17, 130 N.M. 670, 29 P.3d 1071 (observing that the fact finder is "not obligated to believe Defendant's testimony, to disbelieve or discount conflicting testimony, or to adopt Defendant's view). Moreover, Defendant's assertion that the evidence is "equally consistent" with a hypothesis of innocence [MIO 10] is similarly unavailing because, by its verdict, the fact finder necessarily found the hypothesis of guilt more reasonable than the hypothesis of

innocence. *See State v. Montoya*, 2005-NMCA-078, ¶ 3, 137 N.M. 713, 114 P.3d 393 ("When a defendant argues that the evidence and inferences present two equally reasonable hypotheses, one consistent with guilt and another consistent with innocence, our answer is that by its verdict, the jury has necessarily found the hypothesis of guilt more reasonable than the hypothesis of innocence.").

We lastly disagree with Defendant's argument that field sobriety tests are not probative of impairment, because the tests were designed to correlate with specific blood alcohol concentrations. [MIO 8] Evidence of Defendant's unsatisfactory performance on the field sobriety tests was presented to illustrate his apparent inability to follow directions, maintain balance, and perform other simple tasks. These are commonly-understood features of intoxication that are probative of impairment. *See, e.g*, *State v. Neal*, 2008-NMCA-008, ¶ 29, 143 N.M. 341, 176 P.3d 330 (observing that the subject's unsatisfactory performance on field sobriety testing, including his failure to follow instructions and lack of balance, constituted signs of intoxication which supported his conviction for driving under the influence of intoxicating liquor); *State v. Torres*, 1999-NMSC-010, ¶ 31, 127 N.M. 20, 976 P.2d 20 (recognizing that most field sobriety tests are self-explanatory and address commonly understood signs of intoxication). And other evidence—Defendant's weaving into lanes of traffic, the smell of alcohol from his person, and his admission to drinking alcohol—provided the fact finder with additional evidence upon which to convict him for DWI. *See generally State v. Baldwin*, 2001-NMCA-063, ¶ 16, 130 N.M. 705, 30 P.3d 394 (stating that fact finders may draw on their life experiences and understanding of human behavior during a state of intoxication to draw reasonable inferences).

Based on the foregoing, as well as on the reasoning set forth in our notice, we affirm.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

TIMOTHY L. GARCIA, Judge