

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR11-1224

JOHN LEWIS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 30, 2013

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SEVENTH DIVISION
[NO. CR-2010-3929]

HONORABLE BARRY SIMS, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

Following a bench trial, appellant was convicted of driving while intoxicated, first offense, and driving left of center. He was fined \$150, ordered to pay court costs, directed to participate in alcohol treatment and education, and had his driver's license suspended for six months. On appeal, appellant argues that the evidence was insufficient to support his DWI conviction and that the trial court erred in denying his motion to suppress the results of the breathalyzer test. We affirm.

We first address the sufficiency of the evidence. Pursuant to Arkansas Code Annotated section 5-65-103 (Repl. 2005), it is unlawful for a person to operate a motor vehicle at a time when the alcohol concentration in his breath or blood is .08 percent or more. Evidence is sufficient to support a criminal conviction if it is substantial, *i.e.*, of sufficient force and character to compel a conclusion with reasonable certainty without resort to speculation or conjecture. *Graham v. State*, 2012 Ark. App. 90, 389 S.W.3d 33. In determining the



sufficiency of the evidence on appeal, we view the evidence, including any evidence that may have been admitted erroneously, in the light most favorable to the State, considering only that evidence that supports the conviction. *Id.* Applying that standard, this record shows that appellant's vehicle was stopped in Little Rock at approximately 10:00 pm on Saturday, March 21, 2010. Arkansas State Police Trooper Anthony Quick testified that he was traveling westbound behind appellant's vehicle on Cantrell Road and saw appellant's vehicle cross the center line. Trooper Quick stopped appellant's vehicle. Appellant was seated in the driver's seat. The trooper testified that he noticed the odor of intoxicants, and he observed that appellant's eyes were red and watery and that his speech was slowed. Appellant admitted that he had drunk some wine that evening. Quick testified that appellant's driving, his demeanor, and the odor of alcohol led him to believe that appellant was driving under the influence of intoxicants and was a danger to himself or others. Consequently, Quick transported appellant to Pulaski County North Side Intake for a certified blood-alcohol-content test. Quick read the implied consent form to appellant, who said he would take the test. It was stipulated that the machine was certified, and Trooper Quick was certified as an operator to perform breath tests. Approximately one hour from the time he first observed appellant, Trooper Quick administered two tests, both of which registered a blood-alcohol content of .12 percent.

Appellant argues that the evidence is insufficient because the trial court accorded too much weight to the results of the breathalyzer test in light of possible inaccuracies in the testing brought out on cross-examination. However, questions of weight and credibility are inapplicable when the question is the legal sufficiency of the evidence to support a criminal



conviction. See generally *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996). We hold that, on this record, there was substantial evidence to support appellant's DWI conviction.

Next, appellant argues that the trial court erred in denying his motion to suppress the results of the breathalyzer test. He first asserts that the test results should have been suppressed because appellant's stop and arrest were not supported by reasonable suspicion or probable cause. In reviewing a trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error, giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings, and determining whether those facts give rise to reasonable suspicion or probable cause. *Johnson v. State*, 2012 Ark. App. 167, 392 S.W.3d 897. Pursuant to Ark. R. Crim. P. 3.1, a law enforcement officer may stop and detain any person he reasonably suspects is committing a misdemeanor involving danger of forcible injury to persons or damage to property. Driving while intoxicated is such a misdemeanor. *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989). Pursuant to Ark. R. Crim. P. 4.1(a)(ii)(C), a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that the person has been driving under the influence of any intoxicating liquor or drug.

Appellant's argument is largely based on his assertion that Trooper Quick's testimony that he observed appellant's vehicle cross the center line is belied by Quick's testimony on cross-examination that, while viewing a videotape of the pursuit, he was unable to see appellant's vehicle cross the center line. The strength of this argument depends upon the



quality of the video. Having viewed the video, we think that the image quality is so poor that it is not reasonably possible to determine from the video where appellant's vehicle was at any time with respect to the center line. The trial court relied on the trooper's testimony rather than the video in determining that appellant's vehicle crossed the center line. Based on our review of the totality of the circumstances, we hold that the trial court did not clearly err in so finding. Nor, in light of the trooper's further testimony concerning appellant's demeanor when stopped, the presence of the odor of alcohol, and appellant's admission that he had been drinking, can we say that the trial court erred in finding that Trooper Quick had reasonable cause to believe that appellant was driving under the influence of alcohol. We hold that there was reasonable cause for the arrest and that it was proper under Ark. R. Crim. P. 4.1(a)(ii)(C).

Finally, appellant argues that the trial court erred in ruling that appellant had no right to consult with counsel before taking the breathalyzer test. Appellant concedes that the Arkansas Supreme Court held in *Forrester v. State*, 2010 Ark. 291, that a criminal defendant has no right to counsel before taking a breathalyzer test, but he argues that the *Forrester* court did not address Ark. R. Crim. P. 4.5, which precludes law enforcement officers from questioning an arrested person who indicates that he wishes to consult counsel before submitting to any questioning. We do not read *Forrester* so narrowly. That case broadly states that there is no right to consult counsel before taking a breathalyzer test; if the scope of this holding is to be restricted on the theory that submission to a scientific test is to be regarded as testimonial in nature, appellant must address that argument to the Arkansas Supreme Court.



Cite as 2013 Ark. App. 39

Affirmed.

GLADWIN, C.J., and WALMSLEY, J., agree.

James, Carter & Coulter, PLC, by: *John D. Coulter*, and *David H. Williams*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.