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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 10-867

Opinion Delivered March 2, 2011

MARY DIANE COOLEY APPELLANT	APPEAL FROM THE GRANT COUNTY CIRCUIT COURT [NO. CR-2009-98-2]
V.	HONORABLE PHIILLIP H. SHIRRON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

DOUG MARTIN, Judge

Appellant Mary Diane Cooley was found guilty by a jury of one count of driving while intoxicated, third offense, and one count of refusal to submit to a chemical test. Cooley was sentenced to one year in the Sheridan Detention Center and fined $900. She raises a single point on appeal, contending that the evidence was insufficient to convict her of driving while intoxicated.

In reviewing the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *Stewart v. State*, 2010 Ark. App. 584. Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *Id.* We need consider only that testimony that supports the verdict of guilt. *Id.*

The offense of driving while intoxicated is set out in Arkansas Code Annotated section 5-65-103 (Repl. 2005), which provides as follows:

> (a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.
>
> (b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time the alcohol concentration in the person's breath or blood was eight-hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204.

"Intoxicated" is defined in Arkansas Code Annotated section 5-65-102(2) (Repl. 2005) to mean

> influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrian.

Proof of the offense requires a showing that a defendant had "actual physical control of the vehicle while intoxicated," but it does not require a showing that the defendant "was driving the vehicle or driving the vehicle in a hazardous or negligent manner." *Stewart v. State*, 2010 Ark. App. 9, at 2, 373 S.W.3d 387, 389 (citing *Beasley v. State*, 47 Ark. App. 92, 96, 885 S.W.2d 906, 908 (1994)). Further, a conviction for driving while intoxicated is not dependent upon evidence of blood-alcohol content in view of sufficient other evidence of intoxication. *Mace v. State*, 328 Ark. 536, 540, 944 S.W.2d 830, 833 (1997). The observations of police officers with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI charge. *Johnson v. State*, 337 Ark. 196, 202,

987 S.W.2d 694, 698 (1999); *Blair v. State*, 103 Ark. App. 322, 327, 288 S.W.3d 713, 717 (2008). Finally, the refusal to be tested is admissible evidence on the issue of intoxication and may indicate the defendant's fear of the results of the test and the consciousness of guilt. *Johnson*, 337 Ark. at 202, 987 S.W.2d at 698.

In the present case, the sole witness to testify during the guilt phase of the trial was Deputy Jason Spraig of the Grant County Sheriff's Department. Deputy Spraig stated that, on June 19, 2009, he was dispatched to Highway 46 North on a reckless-driver call. While en route to the location, dispatch advised Spraig that the vehicle had pulled into an address at 12623 Highway 46 North. When Spraig arrived at that location, he observed a maroon Jeep Cherokee that matched the description given both by dispatch and the initial witness. Spraig testified that the vehicle was parked in front of the residence with the lights still on, the engine running, and somebody slumped over behind the steering wheel.

Spraig pulled behind the vehicle, and as he walked toward the Jeep, he observed that the window was rolled down. He smelled alcohol coming from the vehicle. When he made contact with the driver of the vehicle, appellant Cooley, she awoke and said that she was sick. Spraig asked Cooley if she was sick from drinking, and she said that she was. While speaking with Cooley, Spraig determined that the smell of the alcohol was coming from her person, not simply from the inside of the vehicle. Spraig also observed that Cooley's eyes were watering and bloodshot, and when she exited the vehicle without being prompted, Cooley stumbled and nearly fell over. Spraig asked Cooley if she would take a series of field sobriety tests, and

although she initially said that she would, agreeing to take the horizontal gaze nystagmus test, Cooley subsequently refused to cooperate with Spraig's instructions.

Spraig placed Cooley under arrest for driving while intoxicated and placed her in the back of his patrol vehicle. He then took her to the Sheridan Detention Center for a blood-alcohol-content (BAC) test. Spraig read the statement-of-rights form to Cooley, but she refused to sign, acknowledge, or respond to anything that was read to her and refused to sign the paperwork. Spraig testified that Cooley said that she was not going to sign anything or cooperate because she knew she was drunk and knew she was guilty of driving while intoxicated. At that point, Spraig charged Cooley with refusal to submit to a BAC or chemical test, as well as driving while intoxicated.

On cross-examination, Spraig testified that, with Cooley's refusal to cooperate in taking the BAC test, he could "only assume that she understood what was on the form and what she was required to do." Spraig was certain, however, that Cooley was competent to agree to take the test. Further, while he conceded that he did not see her driving the vehicle, Spraig testified that, when he arrived at the scene, she was in physical control of the vehicle, the motor was running, and a strong odor of alcohol was coming from the vehicle.

On appeal, Cooley argues that the evidence was insufficient to support her conviction. She contends that Spraig could not have had any opportunity to observe her driving; did not have her perform any field sobriety tests; and did not perform any breath, urine, or blood tests at the police station. Cooley also claims that, even giving "full credence" to Spraig's testimony,

she was "physically and mentally unable to knowingly consent or knowingly refuse to take the tests she was offered at the police station."

Cooley's arguments are entirely without merit. The DWI statute does not require law enforcement officers to actually witness an intoxicated person driving or exercising control of a vehicle. *Springston v. State*, 61 Ark. App. 36, 40, 962 S.W.2d 836, 839 (1998). It is well settled that the State may prove by circumstantial evidence that a person operated or was in actual physical control of a vehicle. *Id*. Circumstantial evidence may constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Id*. at 40–41, 962 S.W.2d at 839. The question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the jury to decide. *Id*. at 41, 962 S.W.2d at 839. Our responsibility as the reviewing court is to determine whether the jury verdict is supported by substantial evidence. *Id*. Here, we find such clearly to be the case.

Deputy Spraig was alerted to a reckless-driving call by dispatch; he found a vehicle matching the description; the engine was running and the lights were on; the driver of the vehicle, Cooley, smelled strongly of alcohol, had watery and bloodshot eyes, and stumbled upon exiting the vehicle; and she refused to cooperate in either the field sobriety tests or the BAC testing at the police station. Taken together, this evidence clearly supports Cooley's conviction for driving while intoxicated. *See Diehl v. State*, 63 Ark. App. 190, 192, 975 S.W.2d 878, 879 (1998) (holding that, where defendant, who smelled strongly of alcohol, was found slumped in the driver's seat with his legs under the steering wheel, the keys in the

ignition, and the engine running, the court of appeals had "no hesitancy in holding that the appellant was in actual physical control of the vehicle" and affirmed DWI conviction).

Affirmed.

VAUGHT, C.J., and GLADWIN, J., agree.