STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0599

State of Minnesota,
Respondent,

vs.

Bonnie Ann Lindquist,
Appellant.

Filed April 8, 2013
Affirmed
Worke, Judge

Aitkin County District Court
File No. 01-CR-11-178

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James P. Ratz, Aitkin County Attorney, Lisa Roggenkamp Rakotz, Assistant County Attorney, Aitkin, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant Bonnie Ann Lindquist argues that the evidence was insufficient to convict her of third-degree driving while intoxicated (DWI) under Minn. Stat. § 169A.03,

subd. 3(2) (2010), because the state failed to prove that her blood-alcohol concentration was .20 or greater within two hours of her driving, and her proffered evidence of post-driving consumption of alcohol invalidated her blood-alcohol concentration test results. We affirm.

FACTS

On February 19, 2011, at about 5 p.m., appellant was involved in a single-car accident as she and her husband Alvin Lindquist (Lindquist) were driving east on Highway 200 in Aitkin County. Another driver, Paula Murray, was approaching from the opposite direction and saw appellant's vehicle cross the centerline in front of her and drive into the ditch on Murray's side of the road. Murray noticed that appellant and Lindquist appeared to be inebriated, and that Lindquist was slightly injured in the accident, but appellant and Lindquist insisted that there was no need to call police. As appellant and Lindquist started to walk toward the nearest town, Murray hailed a neighbor and asked her to call 911. Meanwhile, a passerby stopped and transported appellant and Lindquist to their home.

Three officers responded to the 911 call and arrived at appellant's home soon after 5:30 p.m. They discovered Lindquist in a bedroom, and appellant hiding in a closet. According to all three officers, appellant was holding a cold beer in her hand that was two-thirds to three-quarters full, and she showed signs of alcohol impairment, including an odor of alcohol, a very unsteady gait, slurred words, and red, bloodshot, and watery eyes. None of the three officers saw any other evidence of alcohol in the home, but appellant's vehicle contained nine bottles of beer and an open bottle of brandy.

A phlebotomist conducted a blood draw on appellant at 7:05 p.m. Testing revealed a blood-alcohol concentration of .23.

Appellant was tried on charges of criminal vehicular operation, third-degree DWI, and gross-misdemeanor failure to notify police of personal injury. Appellant raised the defense of post-accident alcohol consumption to challenge the blood-alcohol concentration element of the DWI offenses. She did not testify at trial.

Appellant was convicted of third-degree DWI, which she contends must be reversed because the state failed to prove that the blood-alcohol concentration test was conducted on blood taken within two hours of her driving and failed to offer expert testimony to counter her defense that her post-driving consumption of alcohol negated the test result.

D E C I S I O N

In addressing a claim of insufficient evidence to convict, this court carefully examines the record evidence to determine whether the jury could reasonably find the defendant guilty of the charged offense. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). In conducting this examination, the court views the evidence in the light most favorable to the conviction and assumes that "the jury believed the [s]tate's witnesses and disbelieved any contrary evidence." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010). The verdict should not be altered if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The state must prove each and every element of the offense

beyond a reasonable doubt. *State v. Paige*, 256 N.W.2d 298, 303 (Minn. 1977); *State v. Montgomery*, 707 N.W.2d 392, 400 (Minn. App. 2005).

Under Minn. Stat. § 169A.20, subd. 1(5) (2010), it is a crime for a person to drive a motor vehicle within Minnesota when "the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more[.]" A person who violates this statute is guilty of third-degree DWI if "one aggravating factor was present when the violation was committed." Minn. Stat. § 169A.26, subd. 1(a) (2010). An aggravating factor exists if the driver had "an alcohol concentration of 0.20 or more as measured at the time, or within two hours of the time, of the offense[.]" Minn. Stat. § 169A.03, subd. 3(2).

Appellant asserts that the evidence was insufficient to convict her because the state failed to offer evidence that her blood-alcohol concentration exceeded the legal limit for the DWI offense, as her blood draw did not occur within the two-hour period after she drove her vehicle. She contends that the state was required to offer expert testimony to establish this element of the offense, even though the test occurred only a few minutes after the two-hour testing period. At trial, the state offered evidence that appellant's blood draw occurred at 7:05 p.m., and Murray testified that the accident occurred "around five."

We are satisfied that the state offered sufficient evidence from which the jury could reasonably conclude that appellant's blood-alcohol concentration exceeded .20 within the two-hour statutory testing period. In *State v. Banken*, this court permitted the state to use a sample obtained more than two hours after driving to prove alcohol

concentration "measured within two hours of driving," for purposes of establishing that element of a DWI offense. 690 N.W.2d 367, 371 (Minn. App. 2004), *review denied* (Mar. 29, 2005). There, this court stated that "the important question is whether the alcohol concentration can be accurately shown to be above the legal limit at any time within two hours of driving, not whether the sample was actually taken during that window of time." *Id*. at 372. The court said that "any accurate proof that the driver's alcohol concentration was above the legal limit within two hours of driving, including a test taken more than two hours after driving, can be used as evidence" to prove a DWI offense. *Banken*, 690 N.W.2d at 372. The driver's alcohol concentration in *Banken* was .17 two hours and fifteen minutes after driving, and this court concluded that that alcohol concentration was sufficient to prove a DWI offense that required a concentration of .10 or greater. *Id.*

Here, appellant's blood test occurred only a few minutes outside of the statutory testing window, and the result exceeded the required alcohol concentration for the offense by .03, or nearly half of the result for a fourth-degree DWI offense under Minn. Stat. § 169A.20, subd. 1(5) (2010) (setting forth fourth-degree DWI offense based on person's alcohol concentration being .08 or more). On this evidence, we are unwilling to say that the jury had insufficient evidence from which to conclude that appellant's blood-alcohol concentration was .20 or greater within the testing window. *See id*. at 373 (stating that "[i]t would be unreasonable to distinguish between a test taken one hour and fifty-nine minutes after a defendant was driving and one taken two minutes later, when

both accurately establish that the defendant exceeded the alcohol concentration within two hours of driving").

Appellant also argues that evidence of her post-driving consumption of alcohol provided an affirmative defense to her DWI charges. Her defense derives from the testimony of the three investigating police officers, who stated that appellant held a 2/3–3/4 full can of cold beer when they arrived at appellant's home approximately a half hour after they arrived there post-accident. While appellant's husband testified that appellant also consumed two hot brandies post-accident, the jury was free to disregard this testimony because it was contradicted by the testimony of the three investigating officers, who observed no alcohol in the home other than the one can of beer. Further, Lindquist admittedly lied to police about other evidence, and his testimony was contradicted on many points at trial.

A valid post-accident consumption defense requires the driver to offer evidence to show that post-accident consumption affected the driver's alcohol concentration within the two-hour testing period. *See Dutcher v. Comm'r of Pub. Safety*, 406 N.W.2d 333, 336 (Minn. App. 1987) (requiring driver to show for valid post-consumption defense, that post-accident alcohol consumption resulted in an alcohol concentration that exceeded the legal limit for the offense and without that consumption the driver's alcohol concentration would have been within the legal limit). Here, appellant's defense is incomplete because she failed to show that without the post-accident consumption of alcohol, her blood-alcohol concentration would have been less than .20 and would not

have met the threshold blood-alcohol concentration required for a third-degree DWI offense under Minn. Stat. § 169A.03, subd. 3(2).

Affirmed.