NO. A-20-918

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

vs.

JORI S. WEEKS,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

HONORABLE DARLA S. IDEUS

District Court Judge

BRIEF OF APPELLEE

Prepared and Submitted by:

Robert E. Caples, #21697
Assistant City Prosecutor
555 South 10th Street
Lincoln, NE 68508
(402) 441-7281
rcaples@lincoln.ne.gov

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF STATUTES AND OTHER AUTHORITIES CITED

STATEMENT OF THE BASIS OF JURISDICTION

This is an appeal from the Lancaster County District Court, affirming the judgment of the County Court. A district court order affirming an order or judgment of the county court is a final order that an appellate court has jurisdiction to review. State v. McBride, 27 Neb. App. 219, 223 (2019).

STATEMENT OF THE CASE

A. Issues Actually Tried in the Court Below:

The issue heard by the District Court, sitting as an intermediate court of appeals, was whether the county court erred in finding that the evidence at trial was sufficient to support the conviction for driving under the influence of alcohol (DUI) in violation of Lincoln Municipal Code 10.16.030.

B. Standard of Review:

An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. State v. Montoya, 304 Neb. 96 (2019). In making this determination, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. Id. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id

PROPOSITIONS OF LAW

1. Evidence to support a conviction is sufficient if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt. State v. Montoya, 304 Neb. 96 (2019).

2. An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented. Id.

STATEMENT OF FACTS

The Appellee generally accepts the statement of facts in the Appellant's brief, with the following additions: Brian Giles testified that after assisting in escorting the Appellant out of the bar, Weeks threatened to get a gun, and walked to a truck (49:7-8). Giles took that threat seriously and believed Weeks to be a threat, so he called the police and followed the instructions of dispatch the whole time he was on with 911 (51:1-15). Mr. Giles told the court in detail that he continued to observe the actions of the Appellant, observed him to drive out of the parking lot on two different streets to the parking lot across from the bar (57:17-18). Mr. Giles explained that he continued to watch the vehicle and report to dispatch exactly what was going on until the police came (58:10-14). Mr. Giles continued to watch the vehicle as it drove back to the bar parking lot and told the trial court clearly about the driving movements that it made in the process (59:8-21).

The first police officer was dispatched one minute after the call came in and arrived seven minutes later (74:2-23). The police arrived and observed Mr. Weeks next to the driver's side of the red pickup that had been described by Brian Giles to dispatch (77:9) (89:14).

Travis Laird testified for the defense that he had observed Mr. Weeks get escorted to the exit door of the bar before Laird returned to the party room (154:3-4) and stayed there for five to ten minutes (160:15). Mr. Laird estimated that after going outside to check on Weeks, he spent approximately twenty minutes with him outside (161:23).

Darrell Singleton testified for the defense that he went outside with Mr. Weeks when Weeks was escorted out and stayed briefly for a "couple minutes" (180:3), before returning to the bar to look for a phone (180:11). Mr. Singleton later clarified that he was outside initially for more "like five minutes" before going back in (189:15). Mr. Singleton believes he stayed inside for "maybe ten minutes" (190:3), before going back outside for what he estimated to be at least twenty minutes (191:10), all while never seeing the police arrive or contact the Appellant.(193:7-8). Singleton agreed that there was clear visibility from the inside of the bar by the door to the parking lot (186:10-11).

ARGUMENT

The Appellant's argument is that the "balance of the evidence" suggests that there was insufficient evidence that the Appellant had operated a motor vehicle after becoming intoxicated. Brief for Appellant at 12, 16. This argument has no merit on appeal and is inconsistent with the standard of review for the assigned error.

I. CREDIBILITY IS AN ISSUE FOR THE TRIAL COURT

The primary argument made by the Appellant is a credibility argument regarding Brian Giles, who testified clearly that he observed the Appellant operate his truck and watched his driving actions from the time the Appellant left the bar to the time that the police arrived. The Appellant argues that the police relied solely on information provided by dispatch as a basis for the investigation. Brief for Defendant 6, 8, 14. He further asserts that there was "not any evidence" that the truck had recently been driven. Brief for Appellant at 14.

The record clearly shows the witness statements were relied on by the officers and were presented to the trial court. Brian Giles was found to be a credible witness and it is not for an appellate court to re-weigh the credibility of his testimony. Giles clearly described that he

observed the Appellant drive the truck and that there was good reason based on the threats that were made for him to be watching outside the entire time until the police arrived. The Appellant's own belief that Giles was either "not honest" or was "wrong" in his testimony or that the driving described by Giles is "especially hard to believe" were issues for the trial court to resolve and are misplaced as a basis for this appeal. See Brief for Appellant at 15. It is not for an appellate court to pass on the credibility of witnesses. State v. Montoya, 304 Neb. 96 (2019).

II. CONFLICTS IN THE EVIDENCE ARE FOR THE TRIAL COURT TO RESOLVE

There was clearly a timeline problem for the defense witnesses, whose testimony was inconsistent with the seven-minute response time by the police officers in this case. Nevertheless, the testimony of all the witnesses was considered by the trial court and resolved in the order finding the Appellant guilty. (T4). The Appellant invites this court to revisit and resolve the conflicts in the evidence, but that resolution was the role of the trial court and is not a valid basis for this appeal. When reviewed in the light most favorable to the prosecution, there was no error by the trial court and the order of conviction was properly affirmed by the District Court.

III. THE AUTHORITY CITED BY APPELLANT IS INAPPLICABLE

The Appellant looks to State v. Martin, 18 Neb App. 338 (2010) to support his argument that the evidence presented in this case did not sufficiently prove that the Appellant was in actual physical control of a vehicle while under the influence. Brief for Appellant at 12-13. Martin, however, involved a parked vehicle and there were no facts presented to show when it had last been operated. Accordingly, this court appropriately found that the State failed to present sufficient evidence to sustain Martin's conviction for DUI. Id. The facts of this case, however, are that Brian Giles observed the Appellant driving his vehicle immediately prior to him being contacted by the officer (60:1-3) As acknowledged by the Appellant, the best the defense witnesses

could say is that they didn't see the Appellant driving. Brief for Appellant 9, 10-11. The two witnesses not seeing him driving, however, does not support the argument that there was no evidence that the Appellant did drive the truck, especially since both defense witnesses acknowledged that they left for at least several minutes and were not even present when the police contacted the Appellant. (157:14-18), (187:20-22). There was a very precise timeline of the driving in this case, and the reasoning of Martin is not applicable. The trial court found that the Appellant was driving while he was under the influence, and any rational factfinder could have found that essential element of the offense beyond a reasonable doubt.

IV. UNASSIGNED ERROR SHOULD NOT BE CONSIDERED ON APPEAL

The Appellant argues that the trial court relied on irrelevant evidence, which is alleged to be error on appeal. Brief for Appellant at 16. There was no objection at trial to such evidence, and this was not an issue that was assigned to or decided by the District Court on direct appeal. Moreover, no such error was assigned on appeal to this court as required by Neb. Ct. R. App. P. § 2–109(D)(1)(e) and should not be considered. To be considered by an appellate court, an appellant must both assign and specifically argue an alleged error. State v. Smith, 292 Neb. 434, 459 (2016). Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief. Linscott v. Shasteen, 288 Neb. 276, 286–87 (2014).

CONCLUSION

The record shows sufficient evidence to support the finding of the trial court and the affirmance by the District Court. The allegations by the Appellant have no legal merit and the order of the intermediate appellate court should be affirmed.

Respectfully submitted,

STATE OF NEBRASKA, Appellee

By: ___*/s/ Robert E. Caples*_____

Robert E. Caples, #21697
Assistant City Prosecutor
575 South 10th Street
Lincoln, NE 68508
(402) 441-7263

Certificate of Service

I hereby certify that on Friday, April 09, 2021 I provided a true and correct copy of this *Brief of Appellee State* to the following:

Jori S Weeks represented by James George Sieben (25972) service method: Electronic Service to **jsieben@lancaster.ne.gov**

Signature: /s/ Caples,Robert,E (21697)