

NOT DESIGNATED FOR PUBLICATION

No. 124,780

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

SOPHIA L. VASSER,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; DAVID B. DEBENHAM, judge. Opinion filed September 22, 2023. Affirmed.

Emily Brandt, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, deputy district attorney, *Michael Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

PER CURIAM: Claiming insufficient evidence, Sophia L. Vasser appeals her driving under the influence of alcohol jury conviction.

Two law enforcement officers testified at her jury trial.

Two law enforcement officers testified at Vasser's trial: Officer Justin Joyce with the Topeka Police Department and Lieutenant Adam Simone of the Kansas Highway Patrol.

Officer Joyce testified that on the night of January 22, 2020, he heard on the radio that a Kansas Highway Patrol Lieutenant Simone had stopped a vehicle in the Walgreens parking lot, and he went to assist. He told the jury that he did not see Vasser driving her vehicle and arrived after Simone had stopped her.

He did watch Simone conduct some field sobriety tests and noticed several things. Vasser failed to keep her head still during the tests and failed to follow directions. She had trouble maintaining balance, could not stay in a starting position, and would start the tests before being instructed to do so. Vasser's speech was slurred and difficult to understand. The video footage from Joyce's body camera showing the field sobriety tests was admitted as evidence and published to the jury during trial. He assisted Simone in arresting Vasser, but he did not transport Vasser to jail. Joyce told the court that Vasser stated that she did not mean to be drunk when they were arresting her.

During cross-examination, Joyce testified that Vasser was leaning against her vehicle in the parking lot and was stumbling over herself. He confirmed that Vasser said she did not have her ID or her phone.

Next, Simone testified. He said that on the night of January 22, 2020, he was traveling eastbound on 37th Street and came to a stop in the left turn lane to turn north on Topeka Boulevard. He noticed a vehicle, which was also traveling eastbound, stop to the left of him at the traffic light. He later identified the driver as Vasser. Simone stated that

Vasser must have believed she was in the left turn lane but that she actually stopped in the westbound lane of the road towards oncoming traffic.

He told the jury that he made eye contact with Vasser when she stopped next to him, and Vasser even smiled and waved at him as if nothing was wrong. According to Simone, he then waited for the light to turn green in hopes that Vasser would turn onto Topeka Boulevard, but she did not move even when he waved her to go forward.

Simone then told the jury that he circled around the block and came back behind Vasser's vehicle, and then he activated his flashing lights to initiate a traffic stop. Vasser eventually stopped in the parking lot of Walgreens. Simone stated that Vasser was able to properly park in a parking stall.

Simone approached Vasser and asked her if she knew she was in the wrong lane and if she had been drinking. Simone stated that Vasser said she did not drink and that she was sorry. Simone testified that he then asked her for her driving license, but she could not find it. He asked for her driving license several times, but she kept fumbling through her purse as if she were pretending to look for the license and then eventually told Simone she did not have it and left it at home. Simone told the jury that Vasser's license was suspended. Simone relayed that he then asked Vasser to step outside the vehicle.

Once Vasser left her vehicle, Simone again asked Vasser if she was drinking that night; she did admit to drinking a little. Simone testified he noticed an odor of alcohol from Vasser and that she had bloodshot and watery eyes, slurred speech, and was speaking nonsensically. Simone advised the court that bloodshot and watery eyes can be caused by drinking alcohol. He also stated that while he was in his patrol car, he noticed Vasser lose her balance and then Joyce helped her stand.

After Vasser got out of her car, Trooper Simone administered the horizontal gaze nystagmus, the walk-and-turn, and the one-leg stand field sobriety tests. During the first test, Simone testified that Vasser had a hard time following directions and moved her head instead of following his finger with her eyes. He explained to the jury that when a person is impaired, it is normal to have to repeat the directions to the person.

Simone stated that he administered the walk-and-turn test next. Simone told the jury that he recognized four out of eight indicators of impairment, including losing balance during the instruction phase, starting the test before being instructed to do so, failing to touch heel-to-toe between steps, and making an improper turn. He also added that Vasser was not able to follow his instructions after he repeated them several times and continued to conduct the test incorrectly. Simone explained that the weather was cold at the time of the stop and the pavement was wet, but it was not slick or icy and the ground was level with no potholes or debris.

He then administered the one-leg stand test. Simone testified that he recognized three out of four possible clues of impairment when Vasser took the test. He stated that she swayed when balancing, raised her arms, used her arms to balance herself, and constantly dropped her foot down and raised it back up as if she were dancing. Simone added that no other tests were administered. Although one was not taken, he stated he did ask Vasser if she would take a preliminary breath test.

Simone testified that Vasser became argumentative and almost belligerent as he began to place handcuffs on her. Once Vasser was under arrest, Simone placed Vasser in the back seat of his vehicle and took her to the highway patrol headquarters in Topeka. Simone explained that once at the headquarters, he offered to give her a breath test, which Vasser refused. He then took her to the county jail.

On cross-examination, Simone confirmed that the video recording from his car camera did not start when he first saw Vasser's vehicle stop next to him. Simone also testified that, despite initially refusing the preliminary breath test, Vasser asked to be tested once she was under arrest and in the back seat of Simone's car. Simone added, however, that Vasser did not blow hard enough into the machine for it to get a reading and failed to properly complete the test twice. When asked, Simone told the jury that he was not a drug recognition expert. They are officers specially trained to recognize individuals under the influence of drugs. He stated that her blood alcohol content was unknown because Vasser had refused the intoxilyzer breath test, and he did not obtain a blood sample through Vasser's consent or a search warrant.

The video footage from Simone's vehicle camera containing the encounter, the sobriety tests, and the arrest was admitted as evidence and published to the jury during trial.

Vasser did not testify, but she did stipulate to the facts that her driving license and her driving privileges were suspended at the time of the arrest. The jury found Vasser guilty of all three charges. Vasser was sentenced to a total of 6 months in jail and 12 months' postrelease supervision by community corrections.

Vasser's sole argument on appeal is that the State did not present sufficient evidence to convict her of DUI. Vasser claims that without a breathalyzer test or a blood alcohol content result, the State cannot sufficiently prove that she was so intoxicated she could not safely drive her car solely based on the testimony of the State's witnesses.

An appeal is not a new trial.

In reviewing a sufficiency of evidence challenge in a criminal case, we must "review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses." *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). "This is a high burden, and only when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict." *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020).

Our review of this record compels us to find that the evidence was sufficient to support the jury's finding. The most damaging fact to Vasser's appeal, which she failed to address, is that she repeatedly admitted during the stop that she did drink that night. Also, the video recordings submitted by the State clearly show Vasser displaying multiple signs of impairment in her speech and her performance of the field sobriety tests. Based on these facts, coupled with the testimony of Simone and Joyce regarding their impressions of Vasser's demeanor and their professional experience with DUI traffic stops, a reasonable fact-finder could have inferred that Vasser was under the influence of alcohol and was impaired to the point she was incapable of safely operating a vehicle.

Vasser emphasizes on appeal that the record is void of any direct evidence showing her blood alcohol content. She argues this indicates that no direct evidence supports the conviction that she was intoxicated to a degree where she was not able to safely operate a vehicle. Vasser suggests that the State's failure to produce objective measures of intoxication—such as a breathalyzer or blood test—cannot establish that a rational fact-finder could have found her guilty beyond a reasonable doubt. In other

words, with no breathalyzer or blood test results, she argues that the State cannot prove her guilty.

We reject that argument. A DUI conviction can be based entirely on circumstantial evidence and inference. See *State v. Zeiner*, 316 Kan. 346, 350, 515 P.3d 736 (2022). A jury has the right to draw inferences from the evidence so long as the inference is reasonable. Circumstantial evidence, to be sufficient, need not exclude every other reasonable conclusion. *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021).

To convict Vasser of DUI under K.S.A. 2019 Supp. 8-1567(a)(3), the State had to prove that Vasser "operated or attempted to operate any vehicle . . . while . . . under the influence of alcohol to a degree that rendered the person incapable of safely driving a vehicle." Therefore, the State was not required to present a breathalyzer or blood test results to convict Vasser of DUI. She could be convicted as long as there was competent evidence to support the inference that she was impaired beyond the point of safely operating a vehicle. See *State v. Duncan*, 44 Kan. App. 2d 1029, 1034, 242 P.3d 1271 (2010) ("Evidence of incapacity to drive safely can be established through sobriety tests and other means."). Here, the circumstantial evidence presented by the State supports the jury's finding that Vasser operated her vehicle unsafely while intoxicated.

Reviewing the record in the light most favorable to the State, we find that a rational fact-finder could conclude that Vasser was operating a vehicle while under the influence of alcohol to the point of being unable to safely operate a vehicle.

Affirmed.