Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-130

MARCH TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
	}	
Arthur Blouin	}	DOCKET NO. 337-7-06 Oscr
		Trial Judge: Edward J. Cashman

In the above-entitled cause, the Clerk will enter:

Defendant appeals his convictions of driving while intoxicated, 23 V.S.A. § 1201(a)(2), and driving with an alcohol concentration of 0.08 or more, id. § 1201(a)(1). The State concedes dismissal of the conviction for driving over the legal limit,[*] and thus the appeal with respect to that conviction is moot. We affirm the conviction for driving while intoxicated.

Following a jury trial, defendant was convicted of driving while intoxicated. On appeal, defendant argues that the evidence presented at trial, even when viewed most favorably to the State and excluding modifying evidence, was insufficient to establish that he was intoxicated at the time of operation. See State v. Delisle, 162 Vt. 293, 307 (1994) (in considering a motion for judgment of acquittal, the question is whether "the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant[] [is] guilty beyond a reasonable doubt") (internal quote omitted). According to defendant, the State was never able to establish beyond a reasonable doubt when he operated the vehicle, how much alcohol he had consumed, and when he drank his last drink. Thus, in defendant's view, the relation-back testimony offered by the State's expert was insufficient to support the conviction.

[*] The verdict indicates that the jury found defendant guilty only on the charge of driving while intoxicated, and the State indicates in its brief that the charge of driving over the legal limit was dismissed. The trial court docket entries, however, indicate that defendant was found guilty and sentenced on both counts. Given the jury verdict and the State's unchallenged concession as to dismissal of the charge of driving over the legal limit, any conviction on that charge is vacated.

Upon review of the record, we conclude that the evidence was sufficient to support the conviction. The principal State's witness testified that after observing defendant strike a fence while operating a motor vehicle, he followed defendant, observed further erratic driving, and then called police when defendant arrived at his apartment building. The witness initially testified that these events occurred at dusk. Although he later testified that he observed defendant around 7:30 or 8:30 in the evening, he also testified that it could have been 9:00. The incident occurred in Newport, Vermont near the Canadian border during the evening of June 27, 2006, less than one week after the summer solstice, when it still would have been light at 7:30 or 8:00.

The responding police officer testified that police received the witness's call at 9:10. If the jury believed this testimony, and the complainant's earlier testimony that he called police as defendant arrived at his residence, the jury could conclude beyond a reasonable doubt that defendant was driving at 9:10, regardless of complainant's uncertainty as to time. The officer testified further that he spoke to defendant at defendant's apartment at 9:38, where he (1) admitted operating a vehicle about thirty minutes earlier where the complainant was located, and (2) indicated that he had not had anything to drink since arriving at his apartment. Relying on this evidence and a breath test indicating that defendant had a blood-alcohol concentration of .166 at 10:58 the evening in question, the State's expert testified that defendant would have had a blood-alcohol concentration of approximately .193 at 9:10 that evening. This evidence was more than sufficient for a jury to find beyond a reasonable doubt that defendant operated a motor vehicle while intoxicated that evening. See 23 V.S.A. § 1204(a)(2)-(3) (if a person's alcohol concentration was .08 or more, the trier of fact may infer that the person was intoxicated; if a person's alcohol concentration was .10 or more within two hours of operation, the trier of fact may infer that the person was intoxicated).

Affirmed as to the conviction and sentence for driving while intoxicated.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Brian L. Burgess, Associate Justice