IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR INDIAN RIVER COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 18-AP-7
Lower Tribunal No. 18-CT-3560

APRIL ALAIMO,

Appellant,

v.

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

STATE OF FLORIDA,

Appellee.
_____/
Decision filed June 11, 2019.

Appeal from the County Court for Indian River County; David Morgan, Judge.

Diamond Litty, Public Defender, and Wendy Diaz, Assistant Public Defender, Vero Beach, for appellant.

Bruce Colton, State Attorney, and Elise Kearney, Assistant State Attorney, Vero Beach, for appellee.

AMENDED OPINION[1]

ISENHOWER, J., Acting Circuit Judge.

The Appellant appeals her convictions for DUI and Refusal to Submit to Testing[2]. She argues that the trial court should have granted her motions for judgment of acquittal because the State failed to prove she drove or was in actual physical control of a vehicle.

On March 9, 2018 at approximately 1:15am, Corporal Dominguez of the Vero Beach Police Department responded to a 911 call from the bar manager of Filthy's Fine Cocktails and Beer. When he arrived, he found the bar manager was holding Appellant down on the ground approximately fifteen yards from her car. The evidence indicated that Appellant had driven her car

[1] Amended to correct the lower tribunal case number only.
[2] Appellant elected to try both counts together, declining an offer to sever the charges for trial purposes.

through a chain barrier that separated the area from the bar's parking lot. The bar manager stated to Corporal Dominguez that he was holding Appellant down because Appellant saw the bar manager following her while on the phone with a 911 dispatcher, exited her car, and attacked him.

Officers observed the Appellant's glassy and bloodshot eyes, slurred speech, unsteady balance, profane language, belligerent demeanor, and an odor of alcohol on her breath. The Appellant was arrested for DUI and transported to the Indian River County jail. The Appellant twice refused to perform field sobriety exercises. She also refused a breath test both before and after being read the implied consent warning.

At trial, the law enforcement witnesses testified that they found the Appellant approximately fifteen yards from her car, pinned to the ground by the bar manager. The car's driver door was open, and it was inside an area that was separated from the bar's parking lot by a chain barrier that hung across the opening. There were fresh scratch marks running the length of the car that were consistent with marks from the chain. The State introduced the car's registration, showing that it was registered to the Appellant. The State did not call the bar manager as a witness. Over objection, the trial court admitted out of court statements of the bar manager that he attempted to prevent the Appellant from driving because he believed she had been drinking too much to drive, that she disregarded his warnings and drove through the chain barrier, that he called 911 to report the crime, that the Appellant stopped the car and ran after him, and that he restrained the Appellant until police arrived. Overruling the Appellant's hearsay objection, the trial court stated:

> …the State has to prove there was probable cause [as an element of Refusal to Submit to Testing] and the only way to prove probable cause is to know what he knew. I mean, I think I end up giving at the end a limiting instruction on considering some of the things, but one of the elements of the crime is that he had probable cause and probable cause is arrived (sic) from hearsay…

No special instruction was ever proposed by the Appellant. The State did not argue to the jury at any time that the out of court statements established driving by the Appellant. In closing, the Appellant's trial counsel argued to the jury that no witness came before them and testified that the Appellant drove the car.

The Appellant argues that the trial court erred by admitting the statements of the bar manager over the hearsay objection and, but for the statements, the evidence was insufficient to prove a prima facie case that the Appellant drove or was in actual physical control of the vehicle. We disagree. The trial court correctly admitted the statements as proof of the totality of the

circumstances that the officer used to determine probable cause, an element of Refusal to Submit to Testing,[3] and not as proof of the matters asserted in those statements. The statements are not hearsay. § 90.801, Fla. Stat.; Breedlove v. State, 413 So. 2d 1 (Fla. 1982).

Further, the trial court properly considered the circumstantial evidence from which the officer could deduce that the Appellant was driving the vehicle while intoxicated when denying the Appellant's motions for judgment of acquittal. Steiner v. State, 690 So. 2d 706 (Fla. 4th DCA 1997); State v. Boynton, 556 So. 2d 428, 430 (Fla. 4th DCA 1989). Under these circumstances, the evidence rebutted any reasonable hypothesis of innocence. Kopsho v. State, 84 So. 3d 204, 217–18 (Fla. 2012); Woods v. State, 733 So.2d 980, 985 (Fla.1999); Barwick v. State, 660 So.2d 685 (Fla.1995). For the foregoing reasons, we affirm.

Affirmed.

BRONIS and GRIFFIN, JJ., concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.

[3] In order to establish a prima facie case for Refusal to Submit to Testing, the State must prove the following elements:

1) A law enforcement officer had probable cause to believe the Appellant drove or was in actual physical control of a motor vehicle in this state while under the influence of an alcoholic beverage to the extent that the Appellant's normal faculties were impaired.
2) The law enforcement officer lawfully arrested the Appellant for Driving Under the Influence.
3) The Appellant was informed that if she refused to submit to a chemical test of her breath, her privilege to operate a motor vehicle would be suspended for a period of one year, or, in the case of a second or subsequent refusal, for a period of 18 months.
4) The Appellant was informed that it is a misdemeanor to refuse to submit to a lawful test of her breath, if her driving privilege had been previously suspended for a prior refusal to submit to a lawful test of her breath.
5) The Appellant, after being so informed, refused to submit to a chemical test of her breath when requested to do so by a law enforcement officer.
6) The Appellant's driving privilege had been previously suspended for a prior refusal to submit to a lawful test of her breath.

Fla. Std. Jury Instr. (Crim) 28.13; see also 316.1939, Fla. Stat. (2018).