NO. COA03-1511

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

STATE OF NORTH CAROLINA

v.

BARRY MERRITT, JR.

Harnett County
Nos. 02 CRS 55269
02 CRS 55271
02 CRS 6702

Appeal by defendant from judgments entered 22 May 2003 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 17 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy, for the State.

James M. Bell for defendant-appellant.

THORNBURG, Judge.

On 22 May 2003, a jury found Barry Merritt, Jr. ("defendant") guilty of habitual impaired driving and felonious speeding to elude arrest. Defendant also pled guilty to driving with his license revoked. Defendant was sentenced to three consecutive terms in the custody of the North Carolina Department of Correction, for 34-41 months, 15-18 months, and 120 days, respectively. We find no prejudicial error.

Facts

At trial, Officer Steven Brewington of the Lillington Police Department testified that in the early morning of 15 August 2002, he observed defendant driving a Jeep Cherokee on South Main Street in Lillington. Officer Brewington observed defendant's vehicle move into the left lane even though the right turn signal of defendant's vehicle was on. From the left lane, defendant made a right turn. Next, Officer Brewington observed two tires of defendant's vehicle go up onto the curb of the road. Officer Brewington followed defendant and testified that defendant was driving in the oncoming traffic lane and speeding. Officer Brewington activated his blue light and siren, but defendant did not stop. Defendant drove off the road and onto a dirt path, running over a large log. A short distance later, defendant drove into a ditch, wrecking his vehicle. Defendant then exited his vehicle. Officer Brewington exited his vehicle as well and approached defendant. Defendant was lying face down on the ground. Officer Brewington noted a strong odor of alcohol and placed defendant under arrest. Officer Brewington had to help defendant into the patrol car because defendant was having difficulty walking. Officer Brewington transported defendant to the Harnett County Sheriff's Office. Defendant was asked to perform the intoxilyzer test and other tests, but defendant refused to take the tests.

On appeal, defendant argues that the trial court erred by (1) failing to allow defendant's motion for a mistrial; (2) overruling defendant's objection to testimony by Sergeant Freeman of the

Lillington Police Department; and (3) overruling defendant's objection to remarks made by the prosecutor during closing argument.

I

Defendant contends that the trial court committed reversible error by failing to grant defendant's motion for a mistrial. At trial, the State called Officer Brewington to testify concerning the events that led to the charges against defendant. During Officer Brewington's testimony, the following exchange occurred:

> Q. What happened once you got [defendant] down to Law Enforcement Center?
>
> A. I had to have somebody run an intoxilizer test. Detective Galloway was there. He— I asked him if he would run the test for me. We found out, at that time, you know, his driver's license was revoked for driving while impaired.

Defense counsel objected to this testimony and the trial court sustained the objection. Defense counsel then moved to strike the testimony. The trial court allowed the motion to strike and stated, "[m]embers of the jury, you'll disregard any comments about the driving while impaired."

After the jury left the courtroom, defense counsel made a motion for a mistrial based on Officer Brewington's testimony that defendant's license was previously revoked for driving while impaired. After argument from the prosecution and defense, the trial court denied this motion. Defendant contends that the trial court erred in that the jury was likely prejudiced by hearing

evidence of a prior alcohol abuse conviction when considering whether to find defendant guilty of the same type of crime, notwithstanding the trial court's instruction to disregard the testimony. We agree that the testimony by Officer Brewington was improper and unresponsive to the question asked. For the following reasons, however, we hold that the trial court did not abuse his discretion in failing to grant defendant's motion for a mistrial.

The decision to grant or deny a motion for a mistrial is in the sound discretion of the trial court. *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985). This Court has found no error in a trial court's failure to grant a mistrial where the "[trial] court immediately sustained the objection [to the improper evidence] and ordered the jury not to consider the evidence." *State v. Washington*, 57 N.C. App. 666, 671, 292 S.E.2d 284, 287-88 (1982)(finding no prejudicial error even though evidence of the defendant's prior conviction was improperly elicited because the trial court sustained the objection and ordered the jury not to consider the evidence), *disc. rev. denied and appeal dismissed*, 306 N.C. 750, 295 S.E.2d 485 (1982). In the instant case, the trial court likewise immediately sustained the objection and ordered the jury not to consider the testimony.

Defendant attempts to distinguish the instant case in that the crime testified to improperly at trial was alcohol-related which, defendant argues, is a type of crime that the jury would see as particularly likely to be repeated. As further support for his argument, defendant cites Judge Wynn's dissent in *State v.*

Wilkerson, which was adopted by the North Carolina Supreme Court in reversing this Court's majority decision. *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5 (Wynn, J., dissenting), *dissent adopted per curiam*, 356 N.C. 418, 571 S.E.2d 583 (2002). The *Wilkerson* dissent emphasized that the admission under Rule 404(b) of the North Carolina Rules of Evidence of the bare fact of a defendant's prior conviction where the defendant does not testify is prejudicial, reversible error. *Id.* at 328-29, 559 S.E.2d at 16-17 (Wynn, J., dissenting), *dissent adopted per curiam*, 356 N.C. 418, 571 S.E.2d 583.

These arguments, however, relate to the prejudice that defendant would have suffered had the trial judge failed to grant defendant's motion to strike or instruct the jury to disregard the testimony. In reviewing an assignment of error of the nature asserted by defendant in the instant case, this Court must presume that the jury followed the trial court's instruction to disregard the testimony. *State v. Allen*, 141 N.C. App. 610, 615, 541 S.E.2d 490, 494 (2000), *appeal dismissed and disc. rev. denied*, 353 N.C. 382, 547 S.E.2d 816 (2001). Trial counsel, as officers of the court, should strive to prevent the jury from hearing this improper evidence in the first place. However, we conclude that the trial judge did not abuse his discretion in denying defendant's motion for a mistrial in that the jury was instructed to disregard the errant testimony. Accordingly, this assignment of error is overruled.

II

Defendant next asserts that the trial court erred in overruling defendant's objection to the following exchange between the prosecutor and Sergeant Steve Freeman of the Lillington Police Department during the State's case in chief:

> Q. Have you ever had dealings with the defendant when he was not impaired?
>
> A. I can't recall.

After the trial court overruled defense counsel's objection to this testimony, the prosecutor asked a series of poorly phrased questions about the witness's prior encounters with defendant. For example, the prosecutor asked, "[h]ave you ever had any dealings with [defendant] when his eyes were not glassy?" The trial judge sustained defense counsel's objections to each question. The prosecutor then asked to be heard by the trial judge. Outside of the presence of the jury, both the trial judge and defense counsel voiced concern that the prosecutor's questions were attempts to admit improper testimony concerning defendant's prior bad acts.

After the jury returned to the courtroom, the following exchange transpired between the prosecutor and Sergeant Freeman:

> Q. Sergeant Freeman, you indicated that you have had dealings with the defendant in the past. In any of those dealings, did you have the opportunity to observe the defendant's speech?
>
> A. Yes, sir.
>
> Q. And earlier, when you testified that his speech was slurred, could you tell us how it was different than other times that you had dealt with him?
>
> A. It wasn't slurred in the past.

No objection was made in reference to this testimony.

On appeal, the State does not contend that the trial court did not err when it overruled one of defendant's objections, but rather, argues that defendant has not shown that a reasonable possibility exists that a different result would have been reached absent the error. *State v. Hoffman*, 349 N.C. 167, 182, 505 S.E.2d 80, 89 (1998), *cert. denied*, 526 U.S. 1053, 143 L. Ed. 2d 522 (1999). After a careful review of the transcript and record, we conclude that the State presented substantial unchallenged evidence that defendant was driving while intoxicated on the evening in question. *See id.* (defendant did not show prejudice where the State "presented substantial evidence tending to show defendant's guilt"). Further, the trial court ultimately required the prosecutor to appropriately phrase his questions, allowing the witness to fairly convey his basis for comparing defendant's behavior and appearance on the night in question to defendant's behavior and appearance on other occasions. Again, we admonish trial counsel to phrase questions appropriately in the first place so as to avoid potential prejudice to defendants. However, because defendant has not shown that he was prejudiced by any error stemming from the admission of the testimony at issue, we overrule this assignment of error. N.C. Gen. Stat. § 15A-1443(a)(2003); *see State v. Weeks*, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988).

III

Defendant's final argument asserts that the trial court erred in overruling defendant's objection during the State's closing

argument. Specifically, defendant contends that the prosecutor's description of an intoxilyzer as "[t]he big machine with a tube that comes out of it, and you blow into it, and it says whether he's guilty," is a misstatement of law and thus, the trial court erred by overruling defendant's objection on this ground. This argument is without merit. "Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. Guevara,* 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied,* 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). Further, a prosecutor's statements in jury argument "must be reviewed in the overall context in which they were made and in view of the overall factual circumstances to which they referred." *State v. Penland*, 343 N.C. 634, 662, 472 S.E.2d 734, 750 (1996), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997).

In the instant case, the statement objected to by defendant was made as part of the prosecutor's argument concerning the inferences the jury might make from defendant's refusal to take the intoxilyzer test. The evidence presented at trial established that defendant was given an opportunity to take the intoxilyzer test but declined to do so. Further, North Carolina prosecutors are allowed by statute to use a refusal to take an intoxilyzer-type test against defendants at trial. N.C. Gen. Stat. § 20-16.2(a)(3) (2003)*; see State v. Wike*, 85 N.C. App. 516, 517, 355 S.E.2d 221, 222 (1987) ("the fact of defendant's refusal to take a breathalyzer test is admissible in evidence at trial"). Thus, after reviewing

the overall context and factual circumstances surrounding the statement at issue, we conclude that the trial court did not abuse his discretion by overruling defendant's objection.

No error.

Judges HUDSON and GEER concur.

Report per Rule 30(e).