NO. COA05-1275

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Henderson County
No. 04 CRS 57653

CARROL LEE OWENS,
Defendant.

Appeal by defendant from judgment entered 4 May 2005 by Judge Laura J. Bridges in Henderson County Superior Court. Heard in the Court of Appeals 19 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Haakon Thorsen for defendant-appellant.

GEER, Judge.

Defendant Carrol Lee Owens appeals from his conviction for felonious speeding to elude arrest. After reviewing his challenges to the trial court's jury instructions and its denial of his motion to dismiss for insufficiency of the evidence, we hold that he received a trial free of error and accordingly uphold his conviction and sentence.

Facts and Procedural History

The State's evidence tended to show the following facts. Between 2:00 and 3:00 a.m. on 25 November 2004, defendant was in a black Chevrolet Camaro in Hendersonville, North Carolina, when the car was stopped by police. The police discovered that the Camaro lacked proper insurance, removed the car's license plate, and told the occupants they had to leave the car where it was.

The next afternoon, 26 November 2004, Deputy Kimberly Shelton of the Henderson County Sheriff's Department was patrolling in Hendersonville in a marked police car. As she sat at a stoplight behind another car on Harris Street, she saw a black Camaro without a license plate, driven by a white male. As she watched, the Camaro turned onto Harris Street from a cross-street, squealing its tires, and turned off Harris Street onto Four Seasons Boulevard. Deputy Shelton pulled out to follow it because, as she testified, "it was very obvious this car was absolutely flying." With Deputy Shelton in pursuit, the Camaro traveled along Four Seasons Boulevard straddling the dotted line between the two eastbound lanes. Deputy Shelton estimated the car's speed at around 82 miles per hour. The speed limit for that section of road was 35 miles per hour.

The Camaro then turned off Four Seasons Boulevard onto Dana Road, at which point Deputy Shelton activated her blue lights and siren. The Camaro did not stop, but instead accelerated down Dana Road at about 75 miles per hour, although the speed limit was still 35 miles per hour. Because of heavy traffic, Deputy Shelton called for backup and slowed her vehicle down, although continuing to keep

the Camaro in sight. She observed the Camaro become airborne briefly as it crested a small hill. Then, as the road began to curve, the Camaro moved into the center of the road, forcing cars in both directions into ditches on either side of the road.

With Deputy Shelton still in pursuit, the Camaro turned off of Dana Road and onto Meadowlark Lane, where it came to a stop outside a mobile home. Deputy Shelton pulled up nearby and exited her patrol car with her weapon drawn. She ordered the driver of the Camaro to show his hands. Instead of obeying, the driver jumped out of the car and fled on foot behind a row of mobile homes. Deputy Shelton was able to see the driver's face for approximately three seconds and ultimately identified him as defendant.

After determining that there was no one else in the Camaro, Deputy Shelton began to pursue defendant on foot. She was stopped almost immediately when a woman approached her yelling. The woman, who was defendant's mother, appeared very upset and repeatedly screamed, "That's my son. What are you doing to my son?"

Meanwhile, Deputy Lance Mahoney, who had also participated in the chase on Dana Road, arrived at the mobile home. He spotted defendant running between two mobile homes into an open field and ran after him until an electric fence blocked his pursuit. Although Deputy Mahoney was unable to see defendant's face during the chase on foot, he had earlier recognized defendant (who was previously known to him) as the driver of the Camaro.

Although Deputies Shelton and Mahoney were ultimately unable to apprehend defendant on 26 November 2004, a warrant for his

arrest was issued on 28 November 2004. When Deputy David Bonomo went to defendant's apartment to serve the warrant on 9 December 2004, he eventually discovered defendant hiding under a deck on the back side of the apartment and took him into custody. Defendant was indicted for felonious speeding to elude arrest and was convicted on 4 May 2005. The trial court sentenced him to 11 to 14 months imprisonment. Defendant filed a timely appeal to this Court.

Discussion

Defendant argues on appeal that the trial court erred in denying his motion to dismiss the charge for insufficiency of the evidence. N.C. Gen. Stat. § 20-141.5 (2005) provides, in pertinent part:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> (1) Speeding in excess of 15 miles per hour over the legal speed limit.
>
> . . . .
>
> (3) Reckless driving as proscribed by G.S. 20-140.
>
> . . . .

> (5) Driving when the person's driver[']s license is revoked.

Defendant argues that the State presented insufficient evidence that his driver's license was revoked. Defendant does not, however, contest the sufficiency of the evidence as to whether he was speeding in excess of 15 miles per hour over the speed limit or whether he was driving recklessly.

This Court was faced with a similar situation in *State v. Funchess*, 141 N.C. App. 302, 540 S.E.2d 435 (2000). In that case, the State, as here, charged defendant with a violation of § 20-141.5(b), alleging factors (1), (3), and (5). *Funchess*, 141 N.C. App. at 306, 540 S.E.2d at 438. The *Funchess* Court held that, because § 20-141.5(b) only requires proof of two or more factors, the State is not required to prove all three factors pertinent to defendant's case even if all three were stated conjunctively in the indictment. *Funchess*, 141 N.C. App. at 310, 540 S.E.2d at 440. Since defendant, in this case, has made no argument indicating that the State did not prove factors (1) and (3), and since the State was required to prove only two factors, we hold that the trial court did not err in denying his motion to dismiss for insufficiency of the evidence. *See State v. Stokes*, __ N.C. App. __, __, 621 S.E.2d 311, 318 (2005) ("The lack of evidence or the State's abandonment of . . . [one] aggravating factor did not constitute error[,] [because] [t]he State was only required to prove two of the three factors listed in the indictment to elevate the crime from a misdemeanor to a felony.") This assignment of error is, therefore, overruled.

Defendant also argues that the trial court committed plain error in its jury instructions regarding aggravating factors. The plain error rule is only applied when "'it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . .'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

In this case, after the jury had deliberated for a period of time, it sent a question to the trial judge asking her to clarify the distinction between felonious and misdemeanor speeding to elude arrest. The trial judge, with the consent of the parties, re-read the pertinent portion of her prior instructions. When she reached the aggravating factors portion of her re-instruction, which distinguished between felony and misdemeanor speeding to elude arrest, the judge stated:

> And number four, you must find two or more of the following factors were present at the time: One, speeding in excess of 15 miles per hour over the legal speed limit; two, if there was reckless driving; three, that the driver's license was revoked. The defendant's driver's license was revoked.

Defendant contends the last sentence of this instruction was improper, because it relieved the State of its burden of proving beyond a reasonable doubt that defendant's license was revoked by stating that that factor had been established. We believe defendant misreads the transcript.

"The general rule in North Carolina is that a jury charge must be construed in its entirety." *State v. Mebane*, 61 N.C. App. 316, 319, 300 S.E.2d 473, 476 (1983). *See also State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) ("'The [jury] charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed.'" (quoting *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002))). An examination of the transcript in this case reveals that the trial judge's sentence — "The defendant's driver's license was revoked" — was not a direction to the jury, but a clarification of the preceding sentence.

A reading of the challenged instruction in the context of the other places in the transcript where the judge properly instructed the jury, indicates that the judge was not trying to tell the jury that it had to find that defendant's license was revoked, but rather was trying to make sure the jury understood that the aggravating factor of a revoked license had to apply to defendant himself. The trial judge described the aggravating factors to the jury in three other instances, without any improper implication that the State had already proved that defendant's license had been revoked. In short, a contextual reading of the charge in its entirety does not reveal any error on the part of the trial court, but merely an attempt at clarification, to bring that description of the aggravating factors into consistency with the court's descriptions elsewhere in the jury instructions. We can see no

reasonable possibility that the jury was misled or misinformed or that the trial court committed plain error in its instructions.

Finally, defendant assigns plain error to the trial court's failure to give instructions defining "driving while license revoked" and "reckless driving." This Court has recently rejected this argument in the case of *State v. Wood*, __ N.C. App. __, __, 622 S.E.2d 120, 123 (2005). In *Wood*, the defendant was convicted of speeding to elude arrest, and on appeal he assigned plain error to the trial court's jury instructions, contending the court should have instructed the jury as to the meaning of "driving while license revoked," "negligent driving," and "reckless driving." In that case, as in this case, the defendant cited no statutory or case law authority that would require a judge to issue concurrent instructions defining any of these terms. This Court in *Wood* accordingly held that the judge did not commit plain error in failing to define the terms. *Id.* As *Wood* is indistinguishable from the present case, this assignment of error is also overruled.

No error.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).