NO. COA05-1651

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v. Craven County
Nos. 04 CRS 2329-30

CURTIS LEROY BROADWAY

Appeal by defendant from judgment entered 29 June 2005 by Judge Jerry Braswell in Craven County Superior Court. Heard in the Court of Appeals 24 July 2006.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, for the State.

William D. Spence for defendant-appellant.

MARTIN, Chief Judge.

Defendant, Curtis Leroy Broadway, was arrested for driving while impaired ("DWI") in violation of N.C. Gen. Stat. § 20-138.1 and driving while license revoked in violation of N.C. Gen. Stat. § 20-28. He was convicted of both charges in district court and, upon appeal to superior court was found guilty by a jury of the charges. The trial court consolidated the driving while license revoked conviction with the DWI conviction and imposed a Level One punishment for the DWI conviction. Defendant appeals.

The State's evidence at trial tended to show the following:

On 5 March 2004, at approximately 5:40 p.m., a truck belonging to defendant was driven into Hazel Willis's yard and ultimately crashed into her house in Vanceboro, North Carolina. Ms. Willis testified she was sitting in her living room when she saw the truck hit a tree in her yard and proceed to hit her house causing her chimney to collapse onto the truck. She further testified there was only one person inside the truck and that person had "blood streaming down from his forehead." After calling 9-1-1, Ms. Willis heard someone ask if she had a towel. She grabbed a towel and proceeded to go outside.

Ms. Willis testified the only person in the truck was sitting under the steering wheel leaning to his right with one foot still under the gas pedal. Another man had arrived at the scene and wiped blood from the face of the person in the truck. Ms. Willis exclaimed, "Oh my God, that's Curtis." Defendant is a neighbor of Ms. Willis whom she had known for thirty or forty years.

State Highway Patrol Trooper Fox, the trooper who investigated the accident, testified that when he arrived on the scene, a man who was later identified as defendant, was lying on a stretcher and was being placed into an ambulance. He testified the driver's side door of the truck was not open and he could not open it. After investigating the scene, Trooper Fox went to the hospital where defendant had been transported. When he arrived at the hospital, emergency personnel informed him only one person had been admitted to the hospital as a result of the motor vehicle accident. Trooper Fox then entered defendant's hospital room where he smelled a

strong odor of alcohol. He noticed defendant had a lot of facial bruising, burn marks on his face from the deployment of the air bag, and bruising on his chest consistent with bruising that would be caused by impact with the steering wheel. Based upon his observations of the damage to the truck and the injuries to defendant, Trooper Fox determined defendant was the driver of the truck at the time of the accident and charged defendant with DWI and driving while his license was revoked.

The State and defendant stipulated the hospital had taken a sample of defendant's blood for analysis to determine defendant's alcohol concentration. The hospital uses a serum or plasma blood test rather than a whole blood test required by the DWI law. The parties also stipulated that if a research scientist was called as a witness, he would testify that when the serum/plasma blood test result is converted to a whole blood test result, it would show that defendant's alcohol concentration was 0.29. Finally, the parties stipulated the Division of Motor Vehicles had revoked defendant's drivers license on 24 May 2003, it was still in a state of revocation on 5 March 2004, and defendant knew on 5 March 2004, the date of the offense, that his license was revoked.

Defendant presented evidence in his defense at trial. Bryan Lee Broadway, defendant's son, testified he saw defendant asleep on the passenger side of his truck at approximately 4:45 p.m. on 5 March 2004. Defense witness John F. Lewis testified he saw two people in defendant's truck as it was traveling past his house at approximately 4:50 or 5:00 p.m. on 5 March 2004. Mr. Lewis could

not, however, see who was in the truck. Defense witness Jerry Lee Smith testified he saw someone in the passenger seat of defendant's truck at approximately 5:00 or 5:30 p.m. on 5 March 2004. Although Mr. Smith testified that he saw defendant on the passenger side, he was unable to identify the driver. He testified that the driver of the truck had long hair and he had never known defendant to have long hair.

Finally, defense witness Travis Sanderson testified he noticed a truck had crashed into a house as he was driving by and he ran up to the driver's side of the truck. He observed there was only one person, who was later identified as defendant, in the truck when he arrived at the scene. Defendant had blood on his face and was "leaning down in the passenger side of the truck, towards the steering, the driver's side." Mr. Sanderson further testified he was unable to open the driver's side door of the truck and was able to open the passenger side door only after moving some of the chimney that was in the way as a result of the accident.

At the close of all evidence, the trial court asked defense counsel, "[a]nything from the defense at the close of all the evidence?" Defense counsel replied, "[n]o, sir." The jury found defendant guilty of DWI and driving while his license was revoked.

Defendant presents two arguments on appeal. First, defendant argues the trial court erred in failing to dismiss the charges against him for insufficiency of the evidence. Second, defendant argues the trial court erred in imposing a Level One punishment. Defendant has failed to preserve his first argument and we decline

to consider it. We must, however, remand the matter for correction of a clerical error relating to defendant's second argument.

Defendant first contends the trial court erred by failing to dismiss the charges against him at the close of all evidence for insufficiency of the evidence. We, however, decline to review this assignment of error because defendant did not make a motion to dismiss at the close of all evidence. Although N.C. Gen. Stat. § 15A-1446(d)(5) provides that questions of insufficiency of the evidence may be the subject of appellate review even when no objection or motion has been made at trial, Appellate Rule 10(b)(3) provides that "if a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C. Gen. Stat. § 15A-1446(d)(5) (2005); N.C.R. App. P. 10(b)(3). Our Supreme Court has specifically addressed the inconsistency between the statute and the appellate rule and held that: "[t]o the extent that N.C.G.S. 15A-1446(d)(5) is inconsistent with N.C.R. App. P. 10(b)(3), the statute must fail." *State v. Spaugh*, 321 N.C. 550, 552, 364 S.E.2d 368, 370 (1988) (citation omitted). Accordingly, "a defendant who fails to make a motion to dismiss at the close of all of the evidence may not attack on appeal the sufficiency of the evidence at trial." *Id.*

Recognizing his failure to properly preserve this issue for appellate review, defendant requests this Court use its authority under Appellate Rule 2 and suspend the rules to review this issue. "It is not the role of the appellate courts, however, to create an

appeal for an appellant. . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless[.]" *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). After reviewing the transcript and briefs in this case, we see no manifest injustice on these facts that persuades us to use our discretion to hear this matter under Rule 2 of the North Carolina Rules of Appellate Procedure. Therefore, we decline to address this assignment of error.

Next, defendant contends the trial court erred in imposing a Level One punishment. The trial court is authorized to impose one of five levels of punishment with respect to a defendant convicted of impaired driving, depending upon the presence of statutorily enumerated aggravating and mitigating factors set forth in N.C. Gen. Stat. § 20-179. This statute provides in relevant part:

> the judge must first determine whether there are any grossly aggravating factors in the case. **The judge *must* impose the Level One punishment under subsection (g) of this section if the judge determines that two or more grossly aggravating factors apply**. The judge must impose the Level Two punishment under subsection (h) of this section if the judge determines that only one of the grossly aggravating factors applies.

N.C. Gen. Stat. § 20-179(c) (2005) (emphasis added).

Here, defendant argues the trial court failed to find two grossly aggravating factors before imposing a Level One punishment on him. The transcript of the sentencing hearing indicates the trial court clearly found two grossly aggravating factors in open

court when it stated: "[t]he Court does find that you *[referring to defendant]* have a previous conviction for driving while impaired within the requisite period, authorizing you to be punished at Level 1, and then in addition thereto that your driving privileges were revoked." *See* N.C. Gen. Stat. § 20-179(c)(1)(a) and (c)(2). The "Impaired Driving Determination of Sentencing Factors" AOC form, however, leaves unchecked the trial court's finding that defendant had been convicted of a prior offense involving impaired driving within seven years before the date of the offense at issue. From the transcript and the Level One punishment imposed by the judgment, it is clear the trial court intended to have this box checked. Further, defendant concedes his trial counsel expressly stated at the sentencing hearing he did not dispute that defendant should be sentenced at Level One for his DWI conviction based upon the above two grossly aggravating factors.

Reviewing the record and the transcript, it is clear the trial court's failure to check the box next to one of the two grossly aggravating factors on the AOC form was a clerical error. *See State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (defining a clerical error as "an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination") (citations and internal quotation marks omitted); *see also State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (determining there was a clerical error where the findings of aggravating and mitigating factors on the judgment form were inconsistent with the trial

court's actual findings), *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000); *State v. Thomas*, 153 N.C. App. 326, 341, 570 S.E.2d 142, 151 (finding a clerical error existed where the trial court's actual findings were inconsistent with the AOC form), *disc. review denied*, 356 N.C. 624, 575 S.E.2d 759 (2002). Clerical errors are properly addressed with correction upon remand because of the importance that the records "speak the truth." *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999) (internal quotations and citations omitted). Accordingly, we remand this matter to the trial court for correction of this clerical error on the "Impaired Driving Determination of Sentencing Factors" form.

No error in appeal. Remand for correction of clerical error.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).