An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-956

NORTH CAROLINA COURT OF APPEALS

Filed: 01 May 2007

STATE OF NORTH CAROLINA

v.

JOHNNIE LEONARD MONTGOMERY

Mecklenburg County
Nos. 05 CRS 222035-37
05 CRS 222040-41

Appeal by defendant from judgments entered 28 March 2006 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 April 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for defendant-appellant.

STEELMAN, Judge.

The State presented sufficient evidence that defendant was the operator of a motor vehicle on the night in question to withstand defendant's motion to dismiss at the close of all of the evidence.

The State's evidence tended to show that on the night of 14 May 2005, Charlotte-Mecklenburg Police Officer Thomas Honeycutt observed a white Ford Mustang with customized tail lights traveling on Wilkinson Boulevard at an estimated speed of 70 miles per hour in a 45-miles-per-hour zone near Old Dowd Road in Charlotte, North Carolina. Honeycutt followed the vehicle and saw it proceed

through a red light while turning onto Sam Wilson Road. Maintaining its high rate of speed, the Mustang passed two cars in a no-passing zone before traveling onto the on-ramp for Interstate Highway 85. Honeycutt caught up with the Mustang as it slowed to merge onto the Interstate. Pulling directly behind the vehicle in his marked patrol car, he read its tag number RXS-1665 and observed that the driver was the only occupant of the vehicle. As Honeycutt came within one to two car lengths of the Mustang to initiate a traffic stop, it "swerved left in front of a tractor-trailer and took off at a very high rate of speed" approaching 130 miles per hour.

Honeycutt pulled to the side of the road and broadcast a be-on-the-lookout notice (BOLO) on his police radio. Two to three minutes later, a dispatcher advised him "that a white vehicle had just wrecked on Little Rock Road," approximately one mile from where Honeycutt lost sight of the Mustang. He drove to the intersection of Little Rock Road and Interstate Highway 85 and saw the Mustang "up the embankment on the north bound side of the intersection." A 538-foot skid mark ran from the Interstate off-ramp to the wrecked car. The car was unoccupied, but the engine was warm and leaking fluids. Recognizing the customized tail lights and license tag number, Honeycutt identified the Mustang as the vehicle he observed speeding.

Based on his conversation with a bystander, Honeycutt broadcast a second BOLO "for a black male wearing a white cut-off tee shirt...that had just left the scene of the accident." Five

minutes later, he was notified that defendant had been taken into custody near the Bada Bing nightclub in the 3000 block of Little Rock Road, one-third to one-half mile from the accident scene. Another officer arrived at Honeycutt's location with defendant, who was clad in a white tee shirt and blue jeans. Defendant had the keys to the white Mustang in his left front pants pocket. Using defendant's key, Honeycutt opened the car's door and found an open bottle of brandy in the driver's side floor board. Checking the car's tag number with the Department of Motor Vehicles, Honeycutt learned that defendant was the owner of the vehicle. A subsequent check of defendant's driver's license revealed that his driver's license had been permanently revoked on 10 March 2005.

Honeycutt observed that defendant had red, glassy eyes, was unsteady on his feet, and emitted a "moderate to strong" odor of alcohol. Defendant refused to perform field sobriety tests, saying that "there was no use." Honeycutt arrested defendant, took him to the county jail for processing, and administered an Intoxylyzer which registered defendant's blood alcohol level as .08. Defendant told Honeycutt that he drank two beers after arriving at the Get-A-Way Lounge at 10:30 p.m. Honeycutt described the Get-A-Way Lounge as "close to where [he] first observed the [d]efendant's vehicle, maybe a quarter of a mile away[.]"

In Honeycutt's typed incident report, which was offered into evidence for corroborative purposes, he wrote that defendant "admitted drinking prior to driving." On cross-examination,

Honeycutt was asked whether this portion of his typed report was accurate, as follows:

> Q. ...[O]n the second page of that report, in the first full paragraph, you indicated that during the post-arrest interview, [defendant] admitted to drinking prior to driving; is that correct?
>
> A. Yes.

Honeycutt then explained why this detail was not included in the handwritten notes of his interview with defendant:

> Q. Okay. However, in your written notes that you...used to create or prepare this report, you don't mention anything here about him admitting to driving, correct?
>
> A. No, I don't.
>
> Q. Is that something you added in as you were going along?
>
> A. It's something that is easily remembered.

The report was subsequently published to the jury without objection or a limiting instruction.

Defendant testified that he owned the white Mustang but did not drive the vehicle on the night of 14 May 2005. His friend, Clyde Lowery, paid him $250 to borrow the car on 14 May 2005 in order to race it in a "grudge match" at a track in Mooresville, North Carolina. On the afternoon before the race, Lowery, defendant and Anthony Anderson met at defendant's house. Defendant gave Lowery a spare set of keys to the Mustang. Lowery drove the car to the track, and defendant rode to the track with Anderson in Anderson's car. After the race, the three men agreed to meet at the Get-A-Way Lounge. Because Lowery "had already paid for the

car...for the evening[,]" defendant rode with Anderson and allowed Lowery to continue driving the Mustang. Having Anderson as his "chauffeur," defendant drank three beers at the Get-A-Way Lounge before the group decided to go to the Bada Bing strip club. Lowery told defendant and Anderson that he would meet them at the strip club after he finished talking to a friend. Several minutes after defendant arrived at the Bada Bing, Lowery called him and said, "Man, I wrecked your car." Anderson drove defendant to a nearby gas station to meet Lowery before dropping defendant off at the club "to sit for a little bit" while he took Lowery to get a tow truck. Defendant went into the club and came back outside to call Lowery, who said they were "on the[ir] way." Another officer approached defendant in the parking lot and asked him if he "kn[e]w anything about the white Mustang down the street." Defendant replied, "Yeah, I do, but I wasn't driving." The officer took the keys from defendant's pocket and arrested him. A second officer transported defendant to the accident scene and left him with Honeycutt. Defendant refused to submit to a sobriety test at the scene, telling Honeycutt that he had not been driving and did not drink and drive. After he was taken "downtown" for processing, defendant submitted to the Intoxylyzer test when Honeycutt said "he could make things worse for" defendant if he refused.

Defendant's fiancée, Sherry Surratt Beam, testified that defendant's "cousin Anthony and one of his friends named Clyde" came to their house on the evening of 14 May 2005. Defendant told her that "he was going to the drag strip that night." When the

three men left for the evening, defendant rode with Anderson, "and the other guy was driving...the white Mustang." Neither Lowery nor Anderson testified at trial. On 28 March 2006, a jury returned verdicts of guilty on the charges of driving while impaired, driving while license revoked, reckless driving with wanton disregard, fleeing to elude arrest with a motor vehicle, and transporting an open container of alcohol. Defendant was sentenced to consecutive sentences of 120 days imprisonment on the charges of driving while impaired and driving while license revoked, and a minimum of 8 months and a maximum of 10 months imprisonment on the remaining charges. Defendant appeals.

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss, absent substantial evidence that he was driving the Mustang at the time it was observed by Honeycutt on 14 May 2005. We disagree.

Defendant argues that his operation of the vehicle was an essential element of each of the five offenses of which he was convicted. He contends that the statement found in Honeycutt's incident report, indicating that defendant acknowledged drinking before driving, was not corroborated when presented at trial, citing to *State v. Mack*, 81 N.C. App. 578, 584, 345 S.E.2d 223, 226 (1986). Defendant further contends that evidence of such an admission to a police officer "was not sufficient evidence, standing alone, to overcome a motion to dismiss."

By offering evidence, defendant waived his motion to dismiss at the conclusion of the State's evidence. N.C.R. App. P. 10(b)(3);

State v. Leonard, 300 N.C. 223, 231, 266 S.E.2d 631, 636, *cert. denied*, 449 U.S. 960, 66 L. Ed. 2d 227 (1980). Accordingly, we review the trial court's denial of his motion to dismiss at the conclusion of all the evidence. In reviewing the denial of a motion to dismiss, this Court must determine if the evidence at trial, when viewed in the light most favorable to the State, would allow a reasonable juror to find each essential element of a charged offense, including defendant's identity as the perpetrator. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434-35 (1997). For purposes of our review, the State is entitled to all favorable inferences reasonably arising from the evidence. *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

Defendant challenges only the sufficiency of the evidence of his identity as the driver of the white Mustang. The State may establish that defendant was driving the vehicle through circumstantial evidence. *See State v. Riddle*, 56 N.C. App. 701, 704, 289 S.E.2d 598, 599 (quoting *Helms v. Rea*, 282 N.C. 610, 616, 194 S.E.2d 1, 5-6 (1973)), *appeal dismissed and disc. review denied*, 305 N.C. 763, 292 S.E.2d 16 (1982). "For circumstantial evidence to be sufficient to overcome a motion to dismiss, it need not...point unerringly toward the defendant's guilt so as to exclude all other reasonable hypotheses. The evidence is sufficient to go to the jury if it gives rise to 'a reasonable inference of defendant's guilt.'" *State v. Steelman*, 62 N.C. App. 311, 313-14, 302 S.E.2d 637, 638-39 (1983) (internal citation omitted).

Officer Honeycutt was asked on cross-examination about the portion of his incident report which stated that defendant acknowledged driving the vehicle. We believe a jury could reasonably interpret Honeycutt's response as affirming that defendant did, in fact, admit to driving his vehicle, as indicated in the report. Additional evidence showed that the driver was the sole occupant of the speeding Mustang at the time it ran into the embankment at the northbound exit ramp of Interstate Highway 85 at Little Rock Road. After following the Mustang from Wilkinson Boulevard onto the Interstate, Honeycutt arrived at the scene of the accident only moments after it occurred. The car was empty and its doors were locked; but its engine was still warm. Defendant, the registered owner of the car,[1] was found five minutes later alone in a parking lot three to four blocks away from the accident site. Defendant was intoxicated and had the keys to the car in his pocket. When Honeycutt searched the Mustang's interior, he found an open bottle of brandy on the driver's side floorboard. Taken together and in the light most favorable to the State, we conclude that this evidence was sufficient to support an inference that defendant was driving the Mustang at the time it was observed by Honeycutt. *See Mack*, at 583, 345 S.E.2d at 226; *see also State v. Dooley*, 232 N.C. 311, 312-13, 59 S.E.2d 808, 809 (1950); *State v.*

---

[1]For purposes of the fleeing to elude arrest charge, defendant's status as the Mustang's registered owner constituted "prima facie evidence" that he was driving the vehicle at the time of its unlawful flight from Honeycutt. N.C. Gen. Stat. § 20-141.5(c) (2006).

Dula, 77 N.C. App. 473, 475, 335 S.E.2d 203, 204 (1985); *Riddle*, at 705, 289 S.E.2d at 600.

In his second argument, defendant contends that the trial court's erroneously entered judgment on the jury's guilty verdicts, because there was no proof that he was driving the Mustang at the time it was observed by Honeycutt. We disagree.

Having found the evidence sufficient to withstand defendant's motion to dismiss and to submit the case to the jury, we further find no abuse of discretion by the trial court in failing to set the verdicts aside *ex mero motu*. *See State v. Tuck*, 173 N.C. App. 61, 69, 618 S.E.2d 265, 271 (2005); *Mack*, at 584, 345 S.E.2d at 226-27.

In his third argument, defendant contends the trial court erred in its response to two questions submitted by the jury during its deliberations. We disagree.

Defendant failed to preserve this issue for appeal by offering a timely objection in the trial court, as required by N.C.R. App. P. 10(b)(2). *State v. Walters*, 357 N.C. 68, 91, 588 S.E.2d 344, 358 (citing *State v. Neal*, 346 N.C. 608, 620, 487 S.E.2d 734, 742 (1997), *cert. denied*, 522 U.S. 1125, 140 L. Ed. 2d 131 (1998)), *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). The transcript instead reflects defendant's explicit approval of the court's proposed response to the jury's questions:

> THE COURT: The jury has sent out two questions. One is the definition of preponderance of the evidence, and the second is, does the defense have the power to subpoena witnesses. I

> don't know where this first one came from. I would be inclined to tell them that it's a concept from the civil law and has no relevance to this case, and as to the second one, I will just tell them that they are to decide the case based on the evidence that is before them. I'll hear what either of you have to say about it.

[PROSECUTOR]: The State wouldn't ask for anything different than that, Your Honor.

[DEFENSE]: Neither would I.

Defendant has not assigned or argued plain error on appeal under N.C.R. App. P. 10(c)(4). *See, e.g.*, *State v. Roache*, 358 N.C. 243, 292, 595 S.E.2d 381, 413 (2004) (citing *State v. Grooms*, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001)). Accordingly, we dismiss this assignment of error.

NO ERROR.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).