

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1230

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v.

Buncombe County
Nos. 06 CRS 11300, 11301

KASEAN DAMONT BRYSON

Appeal by Defendant from judgment entered 12 July 2007 by Judge James U. Davis in Superior Court, Buncombe County. Heard in the Court of Appeals 1 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen Mary Barry, for the State.
William B. Gibson, for defendant-appellant.

WYNN, Judge.

A motion to dismiss for insufficient evidence is properly denied where the State has presented "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense."¹ Because we find that the State met that burden in this case, we uphold Defendant Kasean Damont Bryson's convictions for fleeing or attempting to elude a law enforcement officer, with the two aggravating factors of driving while license revoked and driving recklessly, and for being an

¹ *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation and quotations omitted), cert. denied, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

habitual felon.²

On the afternoon of 3 May 2005, Defendant was driving a gray pick-up truck in Asheville, North Carolina, when Asheville Police Officer Mike Lamb passed him going in the opposite direction. Officer Lamb recognized Defendant and knew that his driver's license had been revoked. He later testified that he saw a "surprised . . . kind of a panicked look" cross Defendant's face when he saw Officer Lamb, and that Defendant then "suddenly raised his arm and dipped his head" so that Officer Lamb could no longer see his face. Officer Lamb decided to attempt to stop Defendant for driving with a revoked license; he stated that Defendant "started to accelerate" and that he could hear the RPMs in Defendant's engine increase.

Officer Lamb then started to turn around to pursue Defendant, but he could not execute a U-turn so had to turn onto a side street and come back to the road on which Defendant was traveling, which took "a second or two," during which time Defendant's truck was still in his line of sight. Officer Lamb further testified that it was his common practice to activate his blue lights when chasing

² We note in passing that, although Defendant's notice of appeal to this Court includes the record number for his habitual felon conviction, 06 CRS 11300, Defendant failed to include a copy of that judgment in the record, which nonetheless does contain the relevant indictment and verdict sheet. Because we affirm the conviction that gave rise to Defendant's attaining habitual felon status, the point is moot, but we caution counsel to be vigilant in observing our appellate rules that are jurisdictional in nature. See N.C. R. App. P. 9(a)(3) ("The record on appeal in criminal actions *shall contain . . .* copies of the verdict and of the judgment, order, or other determination from which appeal is taken[.]" (emphasis added)).

someone or executing a three-point turn in traffic, but that he could not specifically recall if he turned them on that day. He did not have his siren on.

Officer Lamb, who was radar certified and had undergone training on estimating the speed of vehicles, stated that Defendant's truck was "accelerating" and "increasing in speed up the hill" while he was turning around to follow it. He estimated Defendant's speed to be approximately forty-five miles per hour at that point. He lost sight of the truck when it crested over the hill, but as he came over the hill himself, he saw a burgundy Buick with both doors on the driver's side "smashed in" and three occupants. He then saw Defendant's truck in a nearby parking lot, with the doors open on the driver's and passenger's sides and one young man running away from the truck. Defendant's speed when he hit the Buick was later estimated to be approximately thirty miles per hour.

After chasing that individual on foot, Officer Lamb and his partner went back to the Buick to check on its occupants, who had to crawl out of the Buick because the doors were inoperable. All three complained at the time of some type of injury. Gray paint was visible around the damage to the Buick. Forty-five minutes to an hour later, Defendant was apprehended inside an apartment in the housing project next to the parking lot where he had left his truck. According to Officer Lamb, Defendant told him that "he wasn't trying to run from" the police but that he had gotten into an accident while trying to find a CD to put in his CD player.

Defendant also told the officers that he had gone up to the apartment because he had an outstanding misdemeanor probation violation.

The three occupants of the Buick were Defendant's cousin, Janice Hyatt, her fourteen-year-old daughter, and Louis Robinson. Ms. Hyatt testified that a truck traveling at a "high rate of speed . . . tried to dodge the cars [on the street] and . . . spun around and hit [her] car." When her car was hit, it "went into . . . a tailspin" and was "sent . . . down the street a little bit." She identified Defendant as the person driving the truck that hit her vehicle. She stated that she told the officers that they had been "chasing [Defendant] at a high rate of speed," but that the officers responded that they were not chasing him. However, both Officer Lamb and his partner, Officer Daryl Fisher, contradicted that testimony and stated that they did not tell Ms. Hyatt at any time that they were "not chasing" Defendant. Ms. Hyatt also testified that the patrol car did not have either its siren or its blue lights on when it arrived on the scene. Mr. Robinson corroborated that the patrol car did not have its lights or siren on.

At the conclusion of Defendant's trial, the jury returned verdicts of not guilty of felony hit-and-run but guilty of fleeing or attempting to elude a law enforcement officer, with the two aggravating factors of driving while license revoked and driving recklessly. Based in part on this conviction, Defendant was then tried and found guilty of attaining habitual felon status.

Although Defendant was also convicted of two misdemeanor offenses of driving while license revoked and reckless driving, the trial court arrested judgment on those verdicts and sentenced Defendant only as an habitual felon for fleeing or attempting to flee a law enforcement officer. He received a sentence of one hundred months' minimum and one hundred twenty-nine months' maximum imprisonment.

Defendant appeals, arguing that there was insufficient evidence as a matter of law that (I) he was fleeing or attempting to elude a law enforcement officer or (II) he was driving recklessly.

I.

Defendant first argues that the State presented insufficient evidence that he was fleeing or attempting to elude a law enforcement officer. He specifically contends that the State failed to prove that he acted "knowingly, willfully, or intentionally" in fleeing Officer Lamb, as he did not have notice that Officer Lamb was pursuing him since Officer Lamb's blue lights and sirens were not on. We disagree.

To survive a motion to dismiss, the State must have presented "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation and quotations omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). "Substantial evidence" is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.*

(citations omitted). In considering a motion to dismiss by the defense, such evidence "must be taken in the light most favorable to the state . . . [which] is entitled to all reasonable inferences that may be drawn from the evidence." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986).

North Carolina law makes it illegal "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." N.C. Gen. Stat. § 20-141.5(a) (2005). Violation of the statute is elevated from a misdemeanor to a felony when accompanied by two or more of the aggravating factors listed in N.C. Gen. Stat. § 20-141.5(b), which include reckless driving and driving while license revoked. See *State v. Funchess*, 141 N.C. App. 302, 309, 540 S.E.2d 435, 439 (2000) ("Although many of the enumerated aggravating factors are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses . . . but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.").

Thus, despite Defendant's assertions to the contrary, the statute makes no requirement that the State show that the defendant acted "knowingly, willfully, or intentionally" in fleeing or attempting to elude a law enforcement officer. Likewise, there is no mention or reference in the statute or case law that the officer must engage his blue lights or siren in pursuing a defendant. Further, the jury heard from Officer Lamb that Defendant had seen

him and attempted to hide his face before accelerating enough that Officer Lamb could hear the RPMs of his engine; Ms. Hyatt also testified that the officers were chasing Defendant, and Officers Lamb and Fisher both contradicted her assertion that they told her otherwise at the scene. Taken as a whole, along with Defendant's actions in leaving the scene of the accident and going to a nearby apartment, we find this evidence sufficient for the jury to reasonably infer that Defendant fled or attempted to elude a law enforcement officer in the lawful performance of his duties. Accordingly, we overrule Defendant's argument on appeal.

II.

Next, Defendant argues that the State presented insufficient evidence as a matter of law that he was driving recklessly.

A review of the trial transcript shows that the basis of defense counsel's motion for insufficiency of the evidence at both the close of the State's evidence and again at the close of all evidence was the contention that Officer Lamb did not activate his blue lights or siren, so Defendant did not "knowingly, willfully, or intentionally" attempt to flee a law enforcement officer. However, defense counsel made no motion or even any argument to the trial court as to reckless driving, either related to the misdemeanor charge or to the aggravating factor. Neither has Defendant asserted plain error to this Court on the issue of recklessness.

As such, this argument was not properly preserved for appellate review and must be dismissed. See N.C. R. App. P.

10(b)(3) ("A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial"); *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount."); N.C. R. App. P. 10(c)(4) (allowing "a question which was not preserved by objection noted at trial" to "nevertheless . . . be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.").

Affirmed in part; dismissed in part.

Judges BRYANT and JACKSON concur.

Report per Rule 30(e).