NO. COA09-58

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v. Columbus County
No. 07CrS448

MICHAEL SCHUYLER SHORT,
Defendant.

Appeal by Defendant from judgment entered 25 July 2008 by Judge Jack Thompson in Columbus County Superior Court. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State

Winifred H. Dillon, for defendant-appellant

ERVIN, Judge.

Michael Schuyler Short appeals from judgments imposed by the trial court sentencing him to a minimum term of 189 months and a maximum term of 236 months imprisonment in the custody of the North Carolina Department of Correction based upon Defendant's conviction for second degree murder and to a concurrent minimum and maximum term of six months imprisonment in the custody of the North Carolina Department of Correction based upon Defendant's conviction for operating a commercial vehicle while impaired. After a careful review of Defendant's challenge to his convictions in light of the applicable law, we find no error in the trial court's judgments.

Factual Background

State's Evidence

Shortly before 3:00 p.m. on 28 December 2006, Trooper Daniel Hilburn of the North Carolina Highway Patrol initiated a routine traffic stop of a tractor-trailer rig approximately 300 to 400 yards before the intersection of United States Highways 74/76 and North Carolina Highway 211 in Columbus County near Bolton. As he cited the operator of the tractor-trailer rig for speeding, Trooper Hilburn observed a different tractor-trailer rig traveling in an eastbound direction run a red light.[1] Trooper Hilburn did not see or hear any indication that the driver of the second tractor-trailer rig was gearing down or braking. According to other motorists who witnessed the collision, the second tractor-trailer rig approached the intersection of Highways 74/76 and 211 at such a high rate of speed that they knew that he would be unable to stop. As the second tractor-trailer ran the red light, it hit a gray BMW sedan and then collided with a 1995 green Ford van before flipping over and dumping a load of steel. After the collision, the second tractor-trailer rig came to a stop in some nearby woods in an upside down position.

As he approached the BMW, Trooper Hilburn noticed that the driver, Barbara Shuman, although still breathing, was slumped over and in critical condition. The rear of the gray BMW was crushed in, the driver's seat was mangled, and the driver's door was

[1] The second tractor-trailer rig had a combined gross vehicular weight, when empty, of 115,000 pounds, which sufficed to make it a commercial vehicle.

detached. According to one witness, "the impact was . . . so hard that the back of [Ms. Shuman's car] was literally on her back." Ms. Shuman's body was forced into the dashboard and contorted from the impact; she sustained a fractured skull and a large laceration to the back of her head; and the skin on her head was "laid back." Ms. Shuman was ultimately pronounced dead at the scene of the collision.

After emergency personnel arrived to attend to Ms. Shuman, Trooper Hilburn went to the second tractor-trailer rig. At the time that Trooper Hilburn arrived at that vehicle, the occupants were still pinned inside. A few minutes later, however, Defendant was able to climb out of the cab. A passenger, Betty Daniels, remained trapped inside. Trooper Hilburn observed that Defendant had red and glassy eyes, slurred speech, a strong odor of alcohol about his person, and staggered as he walked. Defendant did not have any visible injuries. Based upon his observations of and conversation with Defendant, Trooper Hilburn concluded that Defendant was appreciably impaired and released him to Trooper Richard Capps of the North Carolina Highway Patrol for processing.

As Trooper Hilburn brought Defendant to him, Trooper Capps observed that Defendant had a dazed look and was staggering. When Defendant came closer, Trooper Capps noticed that Defendant's eyes were red and glassy and that Defendant had a strong odor of alcohol about his person. As Trooper Capps conversed with Defendant, he observed that Defendant was "noticeably intoxicated" in that he had a dazed and blank look on his face, had slurred speech, and was

"mushmouthed." After Trooper Capps read Defendant his *Miranda* rights at 3:22 p.m., Defendant stated that he had consumed vodka fifteen hours earlier. Like Trooper Hilburn, Trooper Capps concluded that Defendant was appreciably impaired and requested Trooper W.B. Ezell of the North Carolina Highway Patrol to accompany Defendant to the hospital to be examined by medical personnel on the understanding that Trooper Capps would follow along behind them as soon as he could.[2]

Jeffrey Reynolds, an EMT Paramedic, attended to Defendant at the scene of the collision. At the time of his initial assessment, he did not notice anything amiss with Defendant, except that he found Defendant to be lethargic and observed the smell of diesel fuel and alcohol about his person. Mr. Reynolds did not observe any indication that Defendant had sustained any sort of head injury and reported that Defendant denied feeling pain except in his shoulder.

At approximately 5:18 p.m., Trooper Capps left the accident scene and went to the emergency room at the hospital to which Defendant had been transported. Upon entering the room where Defendant was located, he noticed that Defendant was asleep and detected a strong odor of alcohol. Trooper Capps, who was a certified chemical analyst, informed Defendant of his rights with respect to the provision of a sample of his blood and requested

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[2] Trooper Ezell also noted that Defendant exhibited a strong odor of alcohol, that Defendant's eyes were red and his speech was slurred, and that Defendant used the patrol vehicle to support himself.

Defendant to provide such a sample. At 6:19 p.m., a nurse took two blood samples from Defendant after he provided the necessary consent. Defendant told the nurse that he had been driving the tractor-trailer rig, that he had begun drinking at 3:00 a.m., and that he had been taking Tylenol 3. According to tests performed by the State Bureau of Investigation laboratory on the blood sample taken from Defendant, he had a .14 blood alcohol concentration.[3]

Upon leaving the hospital about five hours after the accident, Trooper Capps took Defendant to the Columbus County Law Enforcement Center in Whiteville, where he charged Defendant with Driving While Impaired, Operating a Commercial Motor Vehicle While Impaired, Driving While License Revoked, and Reckless Driving. After reading Defendant his *Miranda* rights, Trooper Capps asked Defendant the standard questions from the Alcohol Influence Report form. In response to Trooper Capps' questions, Defendant stated that he had begun drinking between 8:00 and 9:00 that morning; that he had consumed half a cup of vodka in Florence, South Carolina; that he had not smoked marijuana or ingested any other drug; and that he would consider himself a "five" on a ten point scale of intoxication. Although his license had been suspended since 2002, Defendant admitted that he had been driving trucks for seven years.

Defendant's Evidence

[3] At the hospital, Trooper Capps spoke with Ms. Daniels, whom he described as "extremely drunk" and as smelling strongly of alcohol. Ms. Daniels told Trooper Capps that she was "[g]oing to North Carolina to get a drink."

On 28 December 2006, Defendant lived in Florence, South Carolina. As of that date, he had been working as a commercial truck driver for eight years. At approximately 9:00 a.m. on 28 December 2006, Defendant picked up his tractor-trailer rig and traveled to a facility operated by NuCor Steel located in Darlington, South Carolina, to pick up a load of steel for transportation to Wilmington.

After he picked up the load of steel in Darlington, Defendant detoured through Florence to pick up Ms. Daniels, who was an acquaintance. Defendant arrived at Ms. Daniels' residence at about noon and resumed his trip to Darlington at about 12:30 p.m. Defendant described Ms. Daniels as "tipsy" at the time that he picked her up.

After leaving Ms. Daniels' residence, Defendant traveled on Interstate 95 until its intersection with Highway 74/76, at which point he exited Interstate 95 and began traveling east on Highway 74/76. As he approached the intersection of Highways 74/76 and 211, Defendant was traveling in the right lane. At that point, Defendant observed another tractor-trailer rig pulled over to the side of the road touching the white line.

As Defendant went by the other tractor-trailer rig, he looked in his passenger side mirror to make sure that he went by it at a safe distance. When he resumed looking in a frontal direction, Defendant noticed that the car in front of him had applied its brakes because a van had entered the intersection. At that time, the traffic signal light governing traffic coming from his

direction of travel was green. Defendant applied his brakes and swerved to the left to avoid the car in front of him, but he struck the left rear of the car in front of him, hit the van in the intersection, and traveled across the median.

According to Defendant, he did not consume any alcohol on the date of the accident and had not had any alcoholic beverage to drink since the preceding midnight. After the accident, Defendant climbed out of the cab of his tractor and walked to the ambulance under his own power. Defendant claimed that no intravenous fluids were administered to him in the ambulance or the hospital, denied that a blood sample was taken from him, and denied signing the adult *Miranda* rights waiver form. A nurse who attended to Defendant when he was admitted to the Columbus County Law Enforcement Center shortly after the accident testified that Defendant was polite and smelled of diesel fuel rather than alcohol.

Procedural History

On 7 February 2007, the Columbus County grand jury returned a bill of indictment charging Defendant with the second degree murder of Ms. Schuman, driving while impaired, operating a commercial vehicle while subject to an impairing substance, driving while license revoked, and reckless driving. The charges against Defendant came on for trial before the trial court and a jury at the 21 July 2008 criminal session of the Superior Court held in Columbus County, North Carolina. During the trial, the trial court dismissed the driving while license revoked and reckless driving

charges. On 25 July 2008, the jury returned verdicts convicting Defendant of second degree murder, driving while impaired, and operating a commercial vehicle while impaired. The trial court arrested judgment with respect to Defendant's conviction for driving while impaired "pursuant to the holding in *State v. Irwin*, 304 N.C. 93, because to permit separate and additional punishment would violate defendant's constitutional protection against double jeopardy." In sentencing Defendant based upon his conviction for operating a commercial vehicle while impaired, the trial court found that Defendant should be subjected to Level Three punishment and ordered that Defendant be imprisoned in the custody of the North Carolina Department of Correction for a minimum term of six months and a maximum term of six months. In sentencing Defendant for second degree murder, the trial court found that Defendant had two prior record level points and should be sentenced as a Level II offender and ordered that Defendant be imprisoned for a minimum term of 189 months and a maximum term of 236 months in the custody of the North Carolina Department of Correction. In addition, the trial court recommended that Defendant make restitution in the amount of $7,978.97 from any work release earnings and receive an alcohol and drug abuse assessment and treatment while incarcerated. As a result of the fact that the trial court did not order that the two active sentences be served consecutively, they will be served concurrently. N.C. Gen. Stat. § 15A-1354(a). Defendant noted an appeal to this Court from the trial court's judgments.

Legal Analysis

At trial, Defendant unsuccessfully sought to present the testimony from his former court-appointed attorney, J.B. Lee, III, concerning certain observations he made of Defendant's physical condition.[4] Defendant's sole argument on appeal stems from the trial court's refusal to allow the presentation of Mr. Lee's testimony before the jury.

The issue of the extent to which Mr. Lee's testimony would be admitted arose for the first time at the conclusion of the jury selection process. At that time, Mr. Lee expressed concern about the possibility that, if he testified about his observations of Defendant's physical condition, he might be questioned on cross-examination about certain "case management" issues. Following a discussion among counsel for the State and Defendant, the trial court conducted an in-chambers conference involving counsel for both parties and Mr. Lee. At the conclusion of that in-chambers conference, the following proceedings transpired:

> COURT: The Court wants to put on the record a summary of what the Court perceives the conference in chambers involved. And I will have counsel for the State or defendant add or correct any matters they feel like are mistaken.
>
> I made an inquiry in chambers of the attorneys present, which were J.B. Lee, Sarah Garner [the prosecutor] and Scott Dorman [Defendant's trial counsel], concerning what the nature of the evidence proposed to be offered through Mr. J.B. Lee. It referred to an observation that he had made some five days subsequent to the action in question of the physical condition of the defendant. He

[4] Defendant waived the attorney-client privilege in order to allow Mr. Lee to testify at his trial.

was-allegedly, he was unable to see any needle marks. That was the proposed evidence that the defendant intended to offer through Mr. Lee.

After-the Court after considering the ramifications of such proposed testimony and the right of the State to fully cross-examine Mr. Lee on not only his observations of the physical condition of the defendant but would have the right to fully cross examine him on any information he had relative to the defendant, which would include conversations.

In view of that, it would appear to the Court that various constitutional issues would arise relative to [the] breach of confidentiality and I have indicated to the State and the defendant that I will not allow the proposed testimony if offered by the defendant into evidence.

In addition, the Court made the observation to the attorneys who were present that this proposed evidence is insignificant and most likely not relevant to the trial of this case.

I ask the State, any corrections, additions?

MS. GARNER: No, Your Honor, I think that's it.

COURT: Any corrections by the defendant or additions?

MR. DORMAN: Additions, your Honor, that after the State rest[s], I will have an opportunity either during, before, or at the conclusion, but before I rest to make an offer of proof as to what the testimony of Mr. J.B. Lee would have been. At that time, the Court will rule fully about whether the testimony is relevant or not.

COURT: I will rule on it at that time. I will prohibit both the attorneys for the State or the defendant to mention this in any opening statements or in any matter, shape or form prior to a voir dire concerning its admissibility.

MR. DORMAN: So at this time you are prohibiting me from mentioning that in opening?

COURT: Absolutely. I am prohibiting both the State and the-you, the defendant, on behalf of the defendant to mention it.

MR. DORMAN: That we would object to and we would ask that that be allowed, but we understand the Court's ruling.

MS. GARNER: Your Honor, by that you mean that the State, and I probably wouldn't bring it up anyway, that Mr. Lee is a potential witness? Or that Mr. Lee would testify as to X, Y, Z? Not the fact that there was a blood draw?

COURT: The proposed evidence through Mr. Lee is prohibited.

MS. GARNER: Yes, sir.

COURT: Unless something occurs during the trial of this case that would open the door allowing-changing my ruling, but other than what I know at this point, what has been proffered to me, I am making my ruling at this time.

Any time you make a pretrial ruling on evidentiary matters that come up is subject to change if the circumstances change from what has been proffered.

MR. DORMAN: Yes, sir. I am to make no mention of it.

COURT: You will make no mention of it and neither will the State.

MS. GARNER: Again not to belabor the point, but if I could also indicate to the Court that essentially Mr. Lee's testimony would effectively be an attempt to suppress the blood [test] results and the motion to suppress is not timely filed, it would be inappropriate.

COURT: Anything further concerning this matter?

MS. GARNER: No, your Honor.

MR. DORMAN: No, sir.

After the State rested, Defendant's trial counsel noted that he had subpoenaed Mr. Lee, who was in the courtroom at that time, and requested to be permitted to make an offer of proof so that the trial court "can have informed testimony about what to base [its] ruling on." Defendant's trial counsel also expressed the hope that the trial court would change its ruling.

On *voir dire*, Mr. Lee testified that he conducted a face-to-face interview with Defendant at the Columbus County Law Enforcement Center on 2 January 2007. According to Mr. Lee, Defendant "told me to look at his arms" "[b]ecause he had no needle marks in his arms." Mr. Lee stated that he looked at Defendant's arms and did not "see any type of marks or bruising or any indication . . . that would indicate . . . that he had blood drawn." After making this observation, Mr. Lee testified that he had Fred Meekins, another lawyer "who is a tenant of mine," "to come in and look at [Defendant's] arms as well" "[b]ecause [he] wanted someone besides [him]self to witness this because [he] wouldn't have been in a position to testify had [he] continued to represent" Defendant.

After the conclusion of Mr. Lee's testimony, the trial court denied Defendant's renewed request that Mr. Lee be allowed to testify on the grounds that:

> It would appear to the Court and the Court will take judicial notice of a well known fact that doesn't require expertise but is common knowledge, I think without controversy, that

> after a blood sample is taken or an IV given and removed and five days have expired unless there is an injury such as a blown blood vessel there would be no visible signs of having received an injection. I don't think there is any controversy about that. I'm just making that for the record. . . .

On appeal, Defendant contends that the trial court erred by excluding Mr. Lee's testimony.

Although a criminal defendant has the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution, the evidence elicited by the defendant in the course of exercising that right must be relevant. *State v. Fair*, 354 N.C. 131, 149-50, 557 S.E.2d 500, 515 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules." N.C. Gen. Stat. § 8C-1, Rule 402. On the other hand, "[e]vidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 402. As a general proposition, "'every circumstance that is calculated to throw any light upon the supposed crime is admissible,'" with the "'weight of such evidence'" treated as a matter "'for the

jury.'" *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (quoting *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966)). "Our Courts have broadly construed [the] definition [of relevance] and have given trial courts considerable freedom in determining relevance and admissibility." *State v. Smith*, 130 N.C. App. 71, 76, 502 S.E.2d 390, 393-94 (1998) (citing *State v. Wallace,* 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)). Although "a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to [N.C. Gen. Stat. § 8C-1,] Rule 403, such rulings are given great deference on appeal." *Id.; see also State v. Lopez*, 188 N.C. App. 553, 556, 655 S.E.2d 895, 897 (2008) (relying on principles enunciated in *Wallace* in rejecting challenge to the exclusion of evidence).

Although Defendant argues that the testimony of Mr. Lee was relevant to bolster his claim that no blood sample was drawn from his arm, we are not persuaded of the validity of this contention. As the trial court noted in denying Defendant's renewed motion that he be allowed to present Mr. Lee's testimony to the jury, there is very little likelihood that any visible signs that blood had been drawn from Defendant's arm on 28 December 2006 would have remained by the afternoon of 2 January 2007. For that reason, the fact that Mr. Lee did not observe any indication that blood had been drawn from Defendant's arm when he saw Defendant in the Columbus County Law Enforcement Center on 2 January 2007 does not tend to show that

blood had not been drawn from his arm four days earlier, since any indication that blood had been drawn on that earlier occasion was likely to have disappeared by the time of Mr. Lee's meeting with Defendant. As a result, given that the testimony of Mr. Lee does not have any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," N.C. Gen. Stat. § 8C-1, Rule 401, and given the degree of deference that we traditionally award to trial judges in making relevance determinations, we hold that the trial court did not err by declining to allow Mr. Lee to testify to his observations of the condition of Defendant's arm on the afternoon of 2 January 2007.

NO ERROR.

Judges MCGEE and JACKSON concur.

Report per Rule 30(e).