NO. COA13-110
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 09 CRS 258861

MARK WILSON

Appeal by defendant from judgment entered 31 May 2012 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Arnold & Smith, PLLC, by Paul A. Tharp, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Mark Wilson ("Defendant") appeals from judgment entered 31 May 2012 after a jury verdict convicting him of impaired driving. Defendant argues that the trial court erred by (1) denying his motion to dismiss, (2) denying his motion to suppress, and (3) allowing testimony regarding a blood sample where the chain of custody was not properly established. We find no error.

I. Factual & Procedural History

Defendant was charged with impaired driving on 8 December 2009. On 1 November 2010, Defendant was found guilty in district court and appealed to the Mecklenburg County Superior Court for a jury trial. Prior to the trial, Defendant filed motions to suppress his arrest based on unlawful arrest and to dismiss based on the unavailability of evidence of blood-alcohol tests conducted during his arrest. The motions were denied. The State's evidence at the superior court trial tended to show the following.

On 8 December 2009, at approximately midnight, Officer David Georgion ("Officer Georgion") of the Charlotte-Mecklenburg Police Department watched for cars failing to stop for the stop sign at the intersection of Sedley Road and Arborway in Charlotte. Officer Georgion observed a car drive through the intersection without stopping. The car was traveling at an estimated speed of 45 miles-per-hour in a 25 miles-per-hour zone. Officer Georgion pursued the vehicle, which eventually came to a stop on the wrong side of the street.

Upon reaching Defendant's vehicle, Officer Georgion asked for Defendant's driver license. Instead of giving Officer Georgion his license, Defendant repeatedly mumbled, "I've helped

the police." As Defendant continued to speak, Officer Georgion noticed the smell of alcohol, glassy red eyes, and slurred speech. When asked, Defendant admitted to having three beers that evening. Officer Georgion then placed Defendant under arrest for driving while impaired.

After passing out at the jail, Defendant was transported to the hospital. Deputy Edward Elmendorf of the Mecklenburg County Sheriff's Office, a licensed chemical analyst, took Defendant's blood and put it in sealed containers before giving it to Officer Georgion. Officer Georgion delivered the sealed blood kit to property control. Ann Charlesworth, a criminalist for the Charlotte-Mecklenburg Police Department crime lab tested the blood for alcohol concentration. Following Defendant's objection, based on concerns regarding the chain of custody, the trial court did not allow testimony regarding the results of Ms. Charlesworth's blood testing.

Defendant presented testimony that he only consumed two beers prior to driving. Defendant testified that after he was pulled over, he was arrested and was not told why he was being arrested. Defendant said he had previously assisted the police in apprehending burglary suspects and mistook Officer Georgion for one of the officers he had worked with. Defendant testified

that the emergency room doctor told him he had a heart murmur, which was the reason he passed out.

On 9 March 2011, Defendant filed a motion to suppress with the superior court based on violations of Defendant's constitutional rights, as Defendant's arrest was made without probable cause or reasonable suspicion. On 10 June 2011, the superior court denied Defendant's motion to suppress. On 23 May 2012, Defendant filed a motion to dismiss based on the destruction of evidence by the Charlotte Mecklenburg Police Department. During the trial, the trial court denied Defendant's motion to dismiss.

On 31 May 2012, Defendant was found guilty of impaired driving and was sentenced to 40 days imprisonment, suspended for 12 months of unsupervised probation. Defendant timely filed notice of appeal on 14 June 2012.

II. Jurisdiction

As Defendant appeals from the final judgment of a superior court, an appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

Defendant first argues that the trial court erred in denying his motion to dismiss where the blood sample was

destroyed and Defendant was not given the opportunity to test the sample. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. "To establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *State v. McNeil*, 155 N.C. App. 540, 542, 574 S.E.2d 145, 147 (2002), *disc. rev. denied*, 356 N.C. 688, 578 S.E.2d 323 (2003). "Favorable" evidence can be either exculpatory or useful in impeaching the State's evidence. *State v. Williams*, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008). "Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002). "[A] 'reasonable

probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

However, when the evidence is only "potentially useful" or when "'no more can be said [of the evidence] than that it could have been subjected to tests, the results of which might have exonerated the defendant,'" the State's failure to preserve the evidence does not violate the defendant's constitutional rights unless a defendant can show bad faith on the part of the State. *State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108, *cert. denied*, 512 U.S. 1224 (1994) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)).

The blood sample in this case has been destroyed. It is speculative to try and determine whether the blood would have been material and favorable to Defendant. There is nothing to show that the blood would have been exculpatory. Since the blood sample was only "potentially useful," Defendant must show bad faith on the part of the State. Defendant presents no evidence of bad faith. The only evidence at trial showed that the blood sample was destroyed in February of 2011, more than a year after Defendant's arrest. Defendant made a motion to get the physical evidence for testing on 20 July 2011, more than a

year and a half after the arrest. There is no evidence of bad faith on the part of the State. Since Defendant cannot show that the blood sample would have been material and favorable and cannot show bad faith by the State, the trial court was correct in denying Defendant's motion to dismiss.

Defendant next argues that the trial court erred in denying Defendant's motion to suppress all evidence. Defendant has failed to preserve this objection.

Although Defendant made a motion *in limine* to suppress the evidence arising out of his arrest, Defendant did not object to evidence regarding the traffic stop and arrest at trial. "[A] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (quotation marks and citation omitted). Since Defendant did not object at trial, this issue was not preserved.

Defendant's final argument is that the trial court erred in allowing testimony regarding the blood sample where the chain of custody was not established. We disagree.

Defendant did not object to most of the evidence that Defendant's blood had been taken and that the blood had been tested. Although Defendant did object under Rule 403 to the introduction of evidence regarding why the blood was destroyed and also objected to the introduction of the lab report, both of those objections were granted. Defendant did not object to the testimony of Officer Georgion, Deputy Elmendorf, and Ms. Charlesworth that he now contends should not have been admitted under Rule 403 of our Rules of Evidence.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C. R. App. P. 10(a)(1). Where a party did not make a specific objection at trial, plain error review is available in criminal cases for certain issues. N.C. R. App. P. 10(a)(4). However, in order for plain error review to apply, it must be "specifically and distinctly contended" in the appellant's brief. *Id.* Since Defendant has not requested plain error review, he has not properly preserved these issues for appeal.

Even if Defendant had preserved this issue under plain error, however, we would find no plain error in the present case.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, 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, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516–17, 723 S.E.2d 326, 333 (2012) (quotation marks and citation omitted).

In the present case, the testimony regarding the blood samples was not so prejudicial as to deny Defendant justice. The results of the lab report were not admitted into evidence. The only evidence regarding the blood sample that was before the jury was evidence that there was a blood sample and that it was tested. Absent the test results, the prejudice arising from such evidence is unclear.

Evidence regarding Defendant's intoxication included

Officer Georgion's observations of Defendant's slurred speech, odor of alcohol, and glassy red eyes, as well as his traffic movements, including stopping on the wrong side of the road. Officer Georgion testified that Defendant told him he had consumed three alcoholic drinks that evening. Defendant admitted at trial to having had two drinks. In addition, Defendant passed out at the jail. There was sufficient evidence independent of any chemical analysis for a jury to find Defendant guilty. *See State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) ("An intoxilyzer test and field sobriety tests are not required to establish a defendant's faculties as being appreciably impaired under N.C. Gen. Stat. § 20-138.1."). There is no indication that the evidence that Defendant's blood sample was taken had a probable impact on the jury's verdict. Given the amount of evidence presented to the jury regarding Defendant's guilt, the admission of testimony that Defendant's blood sample was taken and tested was not the sort of "fundamental error" requiring reversal under plain error. *See Lawrence*, 365 N.C. at 516–17, 723 S.E.2d at 333.

IV. Conclusion

For the foregoing reasons we find

NO ERROR

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).