NO. COA13-592
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Buncombe County
No. 11 CRS 064269

RICKIE NEIL CARVER

Appeal by defendant from judgment entered 30 November 2012 by Judge F. Lane Williamson in Buncombe County Superior Court. Heard in the Court of Appeals 21 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Carrie D. Randa, for the State.

James W. Carter for defendant-appellant.

STEELMAN, Judge.

Where the State presented substantial evidence that defendant was operating a motor vehicle, the trial court properly denied defendant's motion to dismiss the charge of driving while impaired. Where defendant failed to make a timely objection to the trial court's failure to admonish the jury pursuant to N.C. Gen. Stat. § 15A-1236, this argument was not properly preserved for appellate review.

I. Factual and Procedural Background

On 11 December 2011, Richie Neil Carver (defendant) was charged with driving while impaired. On 30 November 2012, a jury found defendant guilty as charged. The trial court imposed a level four punishment, and sentenced defendant to 120 days imprisonment. This sentence was suspended and defendant was placed on supervised probation for eighteen months. Defendant was ordered to serve a term of special probation of forty-eight hours.

Defendant appeals.

II. Denial of Motion to Dismiss

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss at the close of all of the evidence. We disagree.

A. Standard of Review

We review the court's denial of a defendant's motion to dismiss as follows:

> [T]he trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the

> State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Parker, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citations and quotation marks omitted). "Defendant's evidence, unless favorable to the State, is not to be taken into consideration.". *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990).

B. Analysis

Viewed in the light most favorable to the State, the evidence showed that State Highway Patrolman Rich Lancaster responded to a call at Cowboy's, a bar located in northern Buncombe County, in the early morning hours of 11 December 2011. He observed a red pickup truck in the bar's parking lot "just right off Old Mars Hill Highway." The truck was stationary, but the engine was running. Defendant was "slumped over the steering wheel . . . passed out." His left hand held a beer can and was resting against the middle of the steering wheel. His "right hand was actually on the steering wheel." Defendant did not respond when Trooper Lancaster tapped on the driver's side window but roused himself after the trooper "[b]eat on the

window . . . three to four times." Defendant then "pull[ed] the door handle" allowing the trooper to open the door. Trooper Lancaster "noticed a strong odor of alcohol coming from the vehicle," and asked defendant to step out of the vehicle. Defendant "slowly stumbled out of the vehicle, almost falling to the ground." Defendant refused to submit to an Alco-Sensor test. Trooper Lancaster noticed that defendant "had red, glassy eyes. He was very unsteady on his feet . . . [and] couldn't even complete a full sentence without slurring his words." Based upon his observations, he concluded "that the defendant had consumed a sufficient quantity of [alcohol] so as to appreciably impair his mental and/or physical faculties" and placed defendant under arrest. After being transported to jail, defendant "stated . . . he was not taking any kind of test" and refused a chemical breath analysis.

The elements of DWI are (1) driving a vehicle; (2) upon any highway, street, or public vehicular area within this state; (3) while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1(a)(1) (2011). Defendant challenges the State's evidence only as to the first element: his operation of a motor vehicle. "[O]ne 'drives' within the meaning of G.S. 20-138.1 if he is in actual physical control of a vehicle . . . which has

the engine running." *State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). The defendant need not have the engine running "for the purpose of moving the car." *Id.* Defendant contends, however, that "the State presented no evidence that [he] was 'in actual physical control' of the vehicle at any point on the date in question. In fact, the State's evidence . . . negates the proposition that he was able to physically control anything when Officer Lancaster arrived at Cowboy's."

We hold that the State presented substantial evidence that defendant was driving the pickup truck on 11 December 2011. Defendant was seated in the driver's seat with the engine running and his hands on the steering wheel. Insofar as he suggests that his intoxication or unconsciousness precluded his "actual physical control" of the vehicle, we note that defendant had the wherewithal to hold a beer can in one hand and have his other hand on the steering wheel. We also note that the engine was running when Trooper Lancaster approached the vehicle. Defendant further demonstrated his "actual physical control" of the vehicle by unlatching the driver's side door for the trooper. The trial court properly denied his motion to dismiss. *See Fields*, 77 N.C. App. at 406, 335 S.E.2d at 70.

III. Failure to Admonish Jury

In his second argument, defendant contends that the trial court erred by failing to admonish the jury *venire* at its initial recess under N.C. Gen. Stat. § 15A-1236(a) (2011), and in denying his later motion to dismiss the panel of prospective jurors and his motion for a mistrial after the jury was selected. We disagree.

N.C. Gen. Stat. § 15A-1236 requires the trial court "at appropriate times" to admonish jurors regarding the duty not to speak about the case prior to deliberations or allow others to speak about the case in their presence; not to form or express an opinion about the case prior to deliberations; to avoid media accounts of the trial; and not to speak to the parties, witnesses, or attorneys. N.C. Gen. Stat. § 15A-1236(a). By its express terms, as well as its location in N.C. Gen. Stat. Chapter 15A, Article 73 (Criminal Jury Trial in Superior Court), rather than Article 72 (Selecting and Impaneling the Jury), the statute does not obviously apply to prospective jurors during the jury selection process. *See State v. Hurst*, 360 N.C. 181, 191, 624 S.E.2d 309, 318 (2006) ("We will assume without deciding that these admonitions apply as well to prospective jurors."). Nor does the statute prescribe the "appropriate

times" when the admonition is required. Assuming, *arguendo*, that N.C. Gen. Stat. § 15A-1236(a) is applicable to jury selection, we find defendant failed to preserve this issue for appellate review.

The transcript of jury selection shows that the trial judge gave the initial instructions required by N.C. Gen. Stat. § 15A-1213 (2011), and advised the jury *venire* of the charge against defendant and of his plea of not guilty. Twelve prospective jurors were summoned into the jury box and questioned by counsel for approximately thirty-five minutes. The judge then announced that a jury in another case had reached a verdict and would be brought into court to conclude that trial. He instructed the jury *venire* as follows:

> I am going to ask you to follow the instructions of the sheriff. He will tell you where to go. I'm going to ask that the 12, and also everyone that's not been chosen back in the pool, be escorted out while we deal with this other matter. Just follow [the sheriff's] instructions.

The proceeding recessed for twenty minutes before the judge brought the parties back into the courtroom to discuss the expected length of the delay. Informed that the jury *venire* was in the jury lounge with the jury coordinator, the judge instructed the sheriff, "Why don't you just let [the

coordinator] know that they will not be needed for at least 30 minutes. They will need to be reminded – I'm not sure I did this before I let them go – that they're not to talk about the case at all."

Forty minutes later, the parties returned to the courtroom. Defense counsel then made the following motion:

> [COUNSEL]: Your Honor indicated that he did not instruct the panel upon relieving them, and based on that, Your Honor, we would ask to dismiss this panel.
>
> THE COURT: I did not instruct them on what?
>
> [COUNSEL]: To not talk to each other or the pool or to mingle or talk about the case or the charge or the client.

The judge denied defendant's motion, noting that "after I sent them out, I did tell the sheriff to remind them of that." When the jury *venire* returned, proceedings continued for less than twenty minutes before being adjourned for the evening. Before releasing the jury *venire* to go home, the judge gave the full admonition required by N.C. Gen. Stat. § 15A-1236(a).

Following jury selection, but before the jury was impaneled, defense counsel "renew[ed] our motion for a mistrial based on the fact that when the jury was excused the first time they weren't instructed not to talk about the case and so forth." The court denied that motion.

Our Supreme Court has held that "a defendant claiming error in the trial court's admonitions pursuant to N.C.G.S. § 15A-1236(a) 'must object . . . in order to preserve [the] issue for appeal.'" *Hurst*, 360 N.C. at 191, 624 S.E.2d at 318 (quoting *State v. Thibodeaux*, 341 N.C. 53, 62, 459 S.E.2d 501, 507 (1995)); *see also* N.C.R. App. P. 10(a)(1). Because he did not make a timely objection to the lack of admonition, or request additional instructions, defendant waived this issue for appellate review.[1] *State v. Daniels*, 59 N.C. App. 442, 445, 297 S.E.2d 150, 152 (1982).

"[T]he defendant also 'must establish that he suffered prejudice as a result of any failure of the trial court to admonish the jury'" under N.C. Gen. Stat. § 15A-1236(a). *Hurst*, 360 N.C. at 191, 624 S.E.2d at 318 (quoting *Thibodeaux*, 341 N.C. at 62, 459 S.E.2d at 507). Rather than attempt to show actual prejudice, defendant suggests that "the failure to instruct the jury not to form opinions before hearing all the evidence violates the accused's constitutional right to an impartial

[1]Although defendant invokes "plain error" in the penultimate sentence of his appellate brief, *see* N.C.R. App. P. 10(a)(4), he does not articulate the plain error standard of review or make any effort to meet that standard. "[B]y simply relying on the words 'plain error' as the extent of his argument, defendant fails to argue plain error and thereby waives appellate review." *State v. Wiley*, 355 N.C. 592, 607, 565 S.E.2d 22, 35 (2002).

jury, and . . . must be deemed prejudicial *per se* in the absence of any inquiry showing no opinions were formed or expressed inappropriately." This Court has rejected the argument that failure to admonish jurors pursuant to N.C. Gen. Stat. § 15A-1236(a) constitutes either constitutional error or reversible error *per se*. *State v. Turner*, 48 N.C. App. 606, 610, 269 S.E.2d 270, 271-72 (1980). Inasmuch as the omission occurred just moments into the jury selection process, before the jury was impaneled, or any evidence was heard, we find defendant's claim to be without merit.

NO ERROR.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).