NO. COA14-863
NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 11CRS235347
11CRS235349

MCKINLEY RAY BARNES

Appeal by Defendant from judgments entered 27 March 2014 by Judge H. William Constangy in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Michael T. Henry, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jillian C. Katz, for the Defendant.

DILLON, Judge.

A jury found McKinley Ray Barnes ("Defendant") guilty of misdemeanor hit and run and reckless driving. The trial court sentenced him to consecutive periods of incarceration totaling 180 days.

On appeal, Defendant claims that the trial court erred in instructing the jury on flight, because the evidence did not show

an act of "flight" beyond what was inherent in the charged offense of hit and run. We hold that Defendant received a fair trial free from prejudicial error.

The State's evidence tended to show the following: On the afternoon of 3 August 2011, a police officer performed undercover surveillance of Defendant at his mother's house in a Charlotte neighborhood. The officer was provided with a picture of Defendant and advised that he "would more than likely be driving an older model Chevy Caprice burgundy, red in color[.]" While on surveillance, the officer saw Defendant and a second man standing by an "older box style" burgundy Chevy Caprice. The officer observed the men enter the Caprice with Defendant in the driver's seat.

The officer radioed members of his surveillance team that the Caprice was on Nations Ford Road heading towards Interstate 77. Within a minute, two of his team members who were in an unmarked car radioed that they had found the Caprice at a location approximately two miles from the officer.

The team members followed the Caprice, where at some point the Caprice pulled beside their unmarked car with the driver's side doors facing each other at a distance of three to five feet. Both officers looked through the Caprice's open driver's side

window and saw Defendant in the driver's seat. One of the officers stated that Defendant was "looking at us . . . like he actually recognized that we were police[.]"

After this encounter, Defendant "took off at a high rate of speed[,]" exiting the parking lot onto Nations Ford headed toward the South Tryon intersection. Crossing over the center line, Defendant drove around the vehicles stopped at the traffic signal, turned "right on South Tryon and struck a vehicle" driven by a woman, Ms. Caughran. The force of the collision, described by Ms. Caughran as "really rough[,]" caused her front passenger's airbag to deploy and totaled her car.[1]

After striking Ms. Caughran's car, Defendant did not stop, but rather drove onto the median and proceeded down South Tryon, passing through a second red light at the Woodlawn Road intersection and striking another vehicle.

The two officers in the unmarked car did not activate their blue lights and siren but maintained visual contact with the Caprice as it proceeded down South Tryon, onto Clanton Road and Interstate 77. Defendant drove north on Interstate 77 at speeds approaching 100 miles per hour before exiting at Remount Road. He

[1] A photograph of Ms. Caughran's car was published to the jury.

ran a stop sign at 60 to 70 miles per hour before turning onto Toomey Avenue.

Concerned by Defendant's high speed and "very dangerous" driving, the two officers in the unmarked car broke off pursuit and "tried to set up a perimeter" by instructing "marked units in the area to search for the vehicle" as they looked for the Caprice in the Wilmore neighborhood. Approximately thirty minutes later, a patrol officer spotted the Caprice in a driveway. Another officer responded to the location to identify the vehicle while fellow officers "check[ed] houses, backyards, [and] woods" in the vicinity, looking for Defendant. An officer likewise searched on foot for Defendant "for an hour, perhaps an hour and a half" in the Wilmore neighborhood and the area around the West Boulevard and South Tryon intersection. Joining this officer were "a lot of personnel" as well as "helicopter assistance [and] canine assistance." Despite extending their search up West Boulevard, officers were unable to locate Defendant on that day.

An officer interviewed Ms. Caughran at the accident scene and observed that her car had sustained "heavy front end damage" and "was disabled." He proceeded to Kingston Avenue to view the Caprice and saw that it was damaged in a manner consistent with the damage to Ms. Caughran's car. The officer signed warrants for

Defendant's arrest after speaking with one of the other officers involved in the pursuit. Defendant was arrested on the warrants two days later.

On appeal, Defendant claims that the trial court erred by giving the following jury instruction on flight:

> The State contends in this case and the Defendant denies that the Defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the Defendant's guilt.

N.C.P.I. Crim. 104.35 (Nov. 2008). He argues that allowing the jury to consider flight as evidence of a defendant's consciousness of guilt is inappropriate in the context of a hit and run charge under N.C. Gen. Stat. 20-166(c) (2011), inasmuch as "fleeing the scene of the collision" is an essential element of the offense. Defendant asserts it is "improper and repetitive to instruct the jury on flight when the defendant's leaving the scene is the only flight."

We review *de novo* the trial court's decision to instruct a jury on flight. *State v. Davis*, ___ N.C. App. ___, 738 S.E.2d 417, 419 (2013).

Our Supreme Court has held that "an instruction on flight is justified if there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Blakeney*, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000) (internal marks omitted). "Flight is defined as leaving the scene of the crime and taking steps to avoid apprehension." *State v. Bagley*, 183 N.C. App. 514, 520, 644 S.E.2d 615, 620 (2007) (internal marks omitted). Therefore, "[m]ere evidence that [the] defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that [the] defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

We are unpersuaded by Defendant's claim that flight is an essential element of misdemeanor hit and run under N.C. Gen. Stat. § 20-166(c). To establish this offense,

> the State must show (i) that [the] [d]efendant was driving a vehicle, (ii) which was involved in a crash, (iii) that [the] [d]efendant knew or reasonably should have known the car was in a crash, (iv) where property was damaged, (v) that [the] [d]efendant failed to immediately stop at the scene of the crash, and (vi) that [the] [d]efendant's failure to stop was intentional or willful.

State v. Braswell, ___ N.C. App. ___, ___, 729 S.E.2d 697, 702, *disc. review denied*, 366 N.C. 412, 735 S.E.2d 338 (2012). In contrast to "flight" in the legal sense, the driver's motive for failing to immediately stop at the crash scene is immaterial. Indeed, a hit and run occurs even if the departing driver is completely without fault in the collision and not subject to "apprehension." *State v. Smith*, 264 N.C. 575, 577, 142 S.E.2d 149, 151 (1965) ("Absence of fault on the part of the driver is not a defense to the charge of failure to stop."). As to this point of law, Defendant's argument is overruled.

Insofar as Defendant suggests that the facts of this case did not support a flight instruction, we disagree. Having reviewed the evidence, we believe the speed and manner of Defendant's departure from the collision site, and his subsequent eluding of police after parking the car, constitute sufficient "steps to avoid apprehension" to support an instruction on flight. *Cf. State v. Harvell*, ___ N.C. App. ___, ___, 762 S.E.2d 659, 664-65 (2014) (upholding flight instruction where the defendant ran from the house he had broken into and was discovered fifteen minutes later on a nearby "dirt road that was . . . 'not a road that people use for traffic.'"). Defendant's conduct went well beyond a mere "fail[ure] to immediately stop at the scene of the crash," as

required for the offense of hit and run. *Braswell*, ___ N.C. App. at ___, 729 S.E.2d at 702.

Finally, assuming, *arguendo*, that the trial court erred, Defendant fails to show a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011). Given the damage sustained by Ms. Caughran's car and the Caprice, we believe the jury would have found that Defendant knew or reasonably should have known that he was involved in a crash where property was damaged irrespective of the flight instruction. While Defendant suggests the evidence was "conflicting" as to who was driving the Caprice, three police officers positively identified him as the driver, and no contrary evidence was offered. Moreover, after viewing Defendant in the driver's seat, two officers maintained continuous observation of the Caprice as it exited the parking lot, collided with Ms. Caughran's car, and continued onto Interstate 77 and Toomey Avenue. Therefore, any error was harmless. *See State v. Taylor*, 362 N.C. 514, 540-41, 669 S.E.2d 239, 262 (2008).

NO ERROR.

Judges ELMORE and STEELMAN concur.

Report per Rule 30(e).