IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-132

Filed: 1 December 2015

Wake County, No. 13 CRS 200306

STATE OF NORTH CAROLINA

v.

JENNIFER BATAYNEH

Appeal by defendant from judgments entered 8 August 2014 by Judge Kendra D. Hill in Wake County Superior Court. Heard in the Court of Appeals 25 August 2015.

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

Mark L. Hayes for defendant-appellant.

BRYANT, Judge.

Assuming testimony regarding defendant's refusal to respond to preliminary investigation questions by law enforcement officers violated defendant's Fifth Amendment right against self-incrimination, the violation was non-prejudicial where the State presented substantial evidence of defendant's guilt, rendering the constitutional error harmless beyond a reasonable doubt. Accordingly, we find no prejudicial error in defendant's trial and the resulting judgment of the trial court.

On 26 March 2013, a grand jury convened in Wake County Superior Court indicted defendant Jennifer Batayneh on charges of Driving While Impaired (DWI), Habitual Impaired Driving, and Driving While License Revoked. The matter came to trial before a jury during the 7 August 2014 session of Wake County Superior Court, the Honorable Kendra Hill, Judge presiding.

In open court, prior to the commencement of trial, defendant filed a motion in limine requesting the trial court to order the prosecution and its witnesses to refrain from making any direct or indirect mention of defendant's responses to investigative questions posed by Wake Forest Police Department Patrol Officer Theresa Gurley in which defendant directed the officer to contact defendant's attorney. The trial court denied the motion.

Evidence presented at trial tended to show that on 4 January 2013, just before 9:00 a.m., Kendra Hicks, an EMT with Wake County EMS, was driving to work on Hwy 98, or Calvin Jones Highway, approaching the intersection with Main Street in Wake Forest. Defendant approached the same intersection from the opposite direction with the intent of making a left turn onto Main Street. When defendant turned in front of Hicks, Hicks applied her brakes, but was unable to stop before her vehicle hit the passenger side of defendant's vehicle. Defendant's eleven year old daughter was in the front passenger seat of defendant's vehicle. After the collision, defendant exited her vehicle, and walked to Hicks's vehicle, Hicks observed defendant

"stumbling, [and having] difficulty walking." Defendant opened the passenger door of Hicks's vehicle and yelled at her for causing an accident, "flailing her hands back and forth, [and] cussing." Hicks called 911. Shortly thereafter, EMS arrived at the scene.

Bradley Bettis, a Wake County EMS worker who responded to the scene of the collision that morning, testified that he approached defendant and her daughter while they were standing on a sidewalk. Bettis testified that defendant was moving around a lot, talking a lot, not able to stand still, and not able to focus on what he was asking her, particularly questions about her daughter. Bettis asked defendant to sit in the ambulance. As she walked, Bettis noted that defendant's "gait was off"; she appeared to be stumbling. Inside the ambulance, Bettis noted that defendant had trouble sitting still; an odor of alcohol emanated from defendant; and defendant's eyes were dilated despite the daylight outside. Bettis testified that dilated or constricted pupils can indicate some sort of drug, "whether it be a stimulant drug, a hallucinogen, [or] opiate . . . ."

While defendant sat in the ambulance, Officer Gurley arrived on the scene and entered the ambulance. Officer Gurley also noted an odor of alcohol coming from defendant. Upon request, defendant produced her driver's license, which had expired. Officer Gurley testified over objection that when she asked if defendant had a valid driver's license, defendant responded that she could contact defendant's

attorney. Officer Gurley asked defendant a series of questions, including: if she had consumed any impairing substance; where she lived; her address; and for the vehicle registration. Defendant repeatedly referred the officer to her attorney.

Officer Gurley noted that defendant's eyes were glassy and red, her clothes wrinkled, and her hair "messy looking." She also noted that defendant was becoming increasingly agitated and using profanity. Because of her conduct, defendant was asked to step out of the ambulance while her daughter was receiving medical treatment. When defendant refused, Officer Gurley grabbed defendant by an arm; defendant struggled and resisted attempts to compel her to leave the ambulance. When Bettis tried to assist Officer Gurley, defendant "bolted up" and pushed against Bettis. Officer Gurley placed defendant under arrest for assault on a government official (EMS worker Bettis).[1] Officer Gurley then requested that defendant submit to a breath test. Defendant responded by directing the officer to speak with "her attorney." Defendant refused to submit to a chemical breath test and refused to participate in field sobriety tests. Officer Gurley testified, however, that based on her observations and her ten years of experience as a police officer, she formed an opinion that defendant was appreciably impaired and charged defendant with DWI. Defendant was transported to the Wake County detention facility where she again

[1] We note the record does not reflect whether the State prosecuted the charge against defendant for assault on a government official.

refused to submit to a breathalyzer test and refused to sign the "acknowledgement of breathalyzer rights" form.

At the close of the State's evidence and outside of the presence of the jury, defendant pled guilty to the charge of driving while license revoked and stipulated to three prior DWI convictions.[2] Defendant then presented her evidence before the jury consisting of testimony from two witnesses: defendant's husband and daughter. Defendant's husband of nineteen years, then a military retiree, testified that in the days prior to the 4 January 2013 accident, defendant had been sick. On 2 January, he had taken defendant to Franklin Regional Medical Center where she was diagnosed with "influenza or a bad case of the flu." Defendant's husband did not drink and testified that he did not keep alcohol in his home. On 4 January, defendant was called into work. Twenty minutes after she left home, defendant's husband got a call from a law enforcement officer reporting the accident. Defendant's daughter, thirteen years old at the time of trial, testified to the sequence of events that occurred after the accident but not to her mother's conduct.

At the conclusion of all the evidence, the trial court instructed the jury on the remaining charge of DWI, and the jury returned a guilty verdict against defendant for DWI. During the sentencing phase, the trial court arrested judgment on the DWI

[2] Pursuant to North Carolina General Statutes, section 20-138.5, "[a] person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense." N.C. Gen. Stat. § 20-138.5(a) (2013).

conviction and entered judgment against defendant for Driving While License Revoked and Habitual Impaired Driving. The trial court sentenced defendant to an active term of 19 to 32 months for Habitual Impaired Driving and a concurrent sentence of 120 days for driving while license revoked. Defendant appeals.

On appeal, defendant argues that the trial court erred in allowing the State to refer to defendant's refusal to answer Officer Gurley's investigative questions in order to imply her guilt. Specifically, defendant contends that Officer Gurley's testimony regarding defendant's repeated responses that the officer contact defendant's attorney violated defendant's right against self-incrimination, as set forth in the Fifth Amendment to the United States Constitution, and as a result, defendant is entitled to have her conviction vacated. We disagree.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2013). "One way the State may meet its burden is by showing that there is overwhelming evidence of Defendant's guilt." *State v. Garcia*, 174 N.C. App. 498, 504, 621 S.E.2d 292, 297 (2005) (citation omitted).

In *State v. Boston*, 191 N.C. App. 637, 663 S.E.2d 886 (2008), this Court, for the first time, extended Fifth Amendment protection against self-incrimination to a defendant's pre-arrest silence when used as substantive evidence of an offense. Therein, this Court considered whether a prosecutor's examination eliciting testimony regarding a defendant's pre-arrest refusal to answer questions from law enforcement officers violated the defendant's Fifth Amendment right against self-incrimination. *Id.* at 646–47, 663 S.E.2d at 893.

> Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence. For example, a defendant's decision to remain silent following her arrest cannot be used as substantive evidence of her guilt of the crime charged. Similarly, a defendant's decision not to testify at trial cannot be used as substantive evidence of her guilt. However, if the defendant is not yet under arrest, the State may use the defendant's pre-arrest silence for impeachment purposes at trial.

Id. at 648, 663 S.E.2d at 894 (citations omitted). The *Boston* Court reasoned that the testimony under review did not fit within any of the stated circumstances: The defendant's *pre-arrest* silence had been used as substantive evidence of her guilt. *Id.* at 649, 663 S.E.2d at 894. The Court acknowledged that the Supreme Court of the United States had not addressed whether the use of a defendant's pre-arrest silence for substantive non-impeachment purposes was precluded by the Fifth Amendment, *id.* at 649, 663 S.E.2d at 894 (citing *Jenkins v. Anderson*, 447 U.S. 231, 238, 65 L. Ed.

2d 86, 94–95 (1980)), while repeating the Supreme Court's assertion that "the Fifth Amendment privilege against self-incrimination 'must be accorded liberal construction in favor of the right it was intended to secure.' *Hoffman v. United States*, 341 U.S. 479, 95 L. Ed. 1118, 1124 (1951)." *Id.* at 652, 663 S.E.2d at 896. Upon consideration of persuasive authority from several federal circuit courts, the *Boston* Court held that the Fifth Amendment right against self-incrimination does not require a custodial interrogation.

> [Rather,] we hold that a proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest. *See* [*Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989), *cert. denied*, 493 U.S. 969, 107 L. Ed. 2d 383 (1989)] (stating that it is a "basic principle" that "application of the [self-incrimination] privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime").

Id. at 651, 663 S.E.2d at 896; *see also State v. Mendoza*, 206 N.C. App. 391, 403, 698 S.E.2d 170, 178 (2010) ("[W]hen a person under arrest has been advised of his *Miranda* rights, which include the right to remain silent, there is an implicit promise that the silence will not be used against that person."); *State v. Adu*, 195 N.C. App. 269, 672 S.E.2d 84 (2009) (holding the prosecutor's comment during closing argument on the defendant's silence in the face of questions by law enforcement officers

investigating a sexual assault charge violated the defendant's right against self-incrimination).

In the instant case, defendant's response to Officer Gurley's questions was referenced several times during the State's case-in-chief.

> [Bettis:] [The struggle] seemed to escalate from when Officer Gurley asked her for her name and was asking her questions, Officer Gurley was saying, look, I am just here to investigate an accident, and that wasn't the exact words, but it was along those lines, I just need to know your name, that sort of thing.
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> And every answer, every question was met with you can talk to my attorney.
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> . . .
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> [Officer Gurley:] . . . I asked her if she had a valid driver's license, and she told me that I could contact her attorney[].
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> . . .
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> [Prosecutor:] After she told you that you could contact her attorney[] regarding her license being expired, what other conversation did you have with her?
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> . . .
>
> Any time I would ask her a question, she would refer me back to her attorney. She told me I could speak to her attorney.
>
> . . .

> And she continued telling me that I could contact her attorney if I wanted to obtain any more information about where she lived, her address, the registration for her vehicle, if she had had anything to drink, and that continued, and with the profanity.

. . .

> Any time you asked her to do anything, whether to exit the ambulance or to submit to a P.B.T., [Portable Breath Test,] she would say contact her attorney.

. . .

> Every time I tried to ask her a question just for information for the DMV report, she would tell me to speak with her attorney.

Based on the reasoning in *Boston*, the trial testimony admitted during the State's case-in-chief emphasizing defendant's refusal to answer investigative questions could be seen as substantive evidence of defendant's guilt; in which case, it would constitute a violation of defendant's Fifth Amendment right against self-incrimination. While the purpose is not entirely clear, assuming *arguendo* the intent of the testimony was to imply defendant's guilt or consciousness of guilt, it would amount to a Fifth Amendment violation.

The State asserts on appeal that defendant's Fifth Amendment argument was waived during defendant's cross-examination of Officer Gurley. "[Defense counsel:] Normally when someone tells you that you can contact the attorney, that is when you stop asking questions, isn't it?"

However, based on the facts in the instant case and our clear legal precedent, we reject the State's assertion. *See State v. Van Landingham*, 283 N.C. 589, 603, 197 S.E.2d 539, 548 (1973) ("The well established [sic] rule in this State is that 'when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost, but, as stated . . . in *Shelton v. Southern R. Co.*, . . . "The rule does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence upon peril of losing the benefit of his exception." ' " (original ellipsis) (citations omitted)).[3]

Again, assuming *arguendo* the facts establish a Fifth Amendment violation, we note that "[a] violation of [a] defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b).

> In *Boston* . . . , our Court set forth several factors to be considered in determining whether the constitutional error of using a defendant's silence as substantive evidence of guilt was harmless beyond a reasonable doubt. *See Boston* . . . , 191 N.C. App. at 651–52, 663 S.E.2d at 896. These factors included
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> > whether the State's other evidence of guilt was substantial; whether the State emphasized the fact

[3] We do not address defendant's alternate argument that defendant's *Miranda* rights were violated as that issue was not before the trial court, and defendant's footnote in her brief, asking for plain error review is not sufficient to preserve this argument for appeal.

> of the defendant's silence throughout the trial; whether the State attempted to capitalize on [the defendant's] silence; whether the State commented on [the defendant's] silence during closing argument; whether the reference to [the defendant's] silence was merely benign or *de minimis*; and whether the State solicited the testimony at issue.

Id. at 652–53, 663 S.E.2d at 896–97.

Adu, 195 N.C. App. at 277, 672 S.E.2d at 89. Therefore, we turn our attention to the elements of the charge the State sought to establish and the evidence presented for that purpose.

Pursuant to North Carolina General Statutes, section 20-138.5, "[a] person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of [the current] offense." N.C. Gen. Stat. § 20-138.5(a) (2013). Because defendant stipulated to three prior DWI convictions at the close of the State's evidence, the habitual impaired driving charge was not submitted to the jury. Thus, we consider whether the evidence establishes defendant committed the offense of DWI as defined in G.S. 20-138.1.

Pursuant to General Statutes, section 20-138.1, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or

any public vehicular area within this State . . . [w]hile under the influence of an impairing substance[.]" N.C. Gen. Stat. § 20-138.1(a)(1) (2013).

> 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. Further, it is a well-settled rule that a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation. An officer's opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer's personal observation of an odor of alcohol and of faulty driving or other evidence of impairment. *The refusal to submit to an intoxilyzer test also is admissible as substantive evidence of guilt on a DWI charge*.

State v. Gregory, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) (emphasis added) (citations and quotations omitted).

Evidence of defendant's impairment was substantial: first, Hicks testified that she observed defendant "stumbling, [having] difficulty walking" when defendant approached Hicks's vehicle just after the accident; EMS worker Bettis testified that defendant was not able to stand still or focus, that defendant's "gait was off," and that she appeared to be stumbling; Bettis also observed an odor of alcohol emanating from defendant and that defendant's eyes were dilated. Officer Gurley noted an odor of alcohol coming from defendant; her eyes were glassy and red; her clothes wrinkly; and her hair "messy looking." Also, defendant became increasingly agitated and used

profanity, and when defendant refused to comply with Officer Gurley's instruction to step out of the ambulance, a struggle ensued.

> [Prosecutor:] So when you say she was fighting you, she was physically fighting with you?
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> [Officer Gurley:] Yes. She was pushing me and she wasn't trying to punch me in the face or anything like that, but she was pushing me and moving away from me and absolutely refusing to exit the ambulance.

Officer Gurley also testified that "Bettis . . . stepped up to assist me with getting [defendant] detained and he stepped over and she pretty much just kind of stood up, just bolted up and pushed up against him."

> [Prosecutor:] Let me ask you about the odor of alcohol. Were you able to smell that once she was outside the ambulance?
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> [Officer Gurley:] Absolutely.
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> [Prosecutor:] Where was that odor of alcohol coming from?
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> [Officer Gurley:] From her breath.
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> [Prosecutor:] How would you characterize the level of that odor of alcohol?
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> [Officer Gurley:] I would say it was strong.
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> [Prosecutor:] The red glassy eyes that you mentioned, were you able to see those outside the ambulance as well?
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> [Officer Gurley:] Yes.

> [Prosecutor:] Tell us what happened there outside the ambulance in terms of your interaction with [defendant]?
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> [Officer Gurley:] Again, I was able to detain her, put her in cuffs, placed her under arrest . . . for [DWI] because I believed that she was under the influence of some kind of impairing substance. Requested that she do a P.B.T., personalized breath test, but she refused that.
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> . . . She refused any field sobriety test which we conduct those generally at roadside[, a walk and turn test, a one leg stand, and also a HGN, horizontal gaze nystagmus test]. At that point, I placed her -- secured her in the back of my patrol vehicle.

Officer Gurley testified that based on her observation of defendant's behavior, as well as the strong smell of alcohol emanating from her breath, she formed an opinion satisfactory to herself that defendant had consumed a sufficient amount of an impairing substance such as to appreciably impair defendant's mental and physical faculties, and that substance was alcohol.

Defendant was transported to the Wake County Detention Facility where Wake Forest Police Officer Chilton requested that defendant submit to a breathalyzer test. Officer Chilton testified that he noticed the strong odor of alcohol on defendant's breath and that defendant shifted or moved around "more than a typical normal person," "shaking back and forth and around . . . kind of viciously." Officer Chilton testified that he also formed an opinion that defendant was under the influence of an

impairing substance. Officer Chilton advised defendant of the rights of a person requested to submit to a chemical analysis to determine alcohol concentration or presence of an impairing substance. In advising defendant, Officer Chilton used a standard form. In addition to refusing to sign the form acknowledging her rights, defendant also refused to submit to the breathalyzer test. Defendant's refusal was admissible as substantive evidence of her guilt. *See Gregory*, 154 N.C. App. at 721, 572 S.E.2d at 840 ("The refusal to submit to an intoxilyzer test also is admissible as substantive evidence of guilt on a DWI charge." (citation omitted)).

All of the above testimony is competent evidence of defendant's impairment. Upon review, the record provides substantial evidence that defendant committed the offense of DWI, and thus, in conjunction with defendant's stipulation to having been convicted of DWI on three prior occasions within ten years of the current offense, there is substantial evidence of defendant's guilt on the charge of habitual impaired driving. Having considered the *Boston* factors and finding the evidence of defendant's guilt on the DWI charge was clear and substantial and outweighed other factors, we hold the State met its burden of proving that any error resulting from a violation of defendant's constitutional rights was non-prejudicial and harmless beyond a reasonable doubt. Accordingly, we overrule defendant's argument.

NO PREJUDICIAL ERROR.

Judges GEER and TYSON concur.

Report per Rule 30(e).