IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-57

Filed: 1 December 2015

Gaston County, Nos. 13 CRS 53838, 53839, 53855

STATE OF NORTH CAROLINA

v.

DONNY LAMAR PHILLIPS

Appeal by Defendant from judgments entered 15 January 2014 by Judge James W. Morgan in Gaston County Superior Court. Heard in the Court of Appeals 9 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Matthew L. Boyatt, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah H. Love, for Defendant.

INMAN, Judge.

Defendant Donny Phillips appeals the judgments entered on his habitual impaired driving and driving while license revoked ("DWLR") convictions. On appeal, Defendant contends that the trial court committed prejudicial error by admitting over objection his driving record, which included prior offenses and convictions, and that the trial court erred by instructing the jury that Defendant was driving at the time

of the current offense with a revoked license because that instruction relied on inadmissible evidence under Rule 404(b).

After careful review, we conclude that Defendant received a trial free of prejudicial error.

Factual and Procedural Background

The evidence presented at trial tended to show the following: On 31 March 2013, Kendra Peterson ("Ms. Peterson") was driving her car in Bessemer City, North Carolina. At an intersection, Ms. Peterson stopped a red light beside a red Camaro. Both lanes continued straight with Ms. Peterson in the left lane and the red Camaro in the right. Both drivers continued straight through the intersection when the light turned green. Shortly after the intersection, the right lane ended. The Camaro tried to merge and Ms. Peterson was forced to swerve to avoid a collision. The Camaro pulled in front of Ms. Peterson.

Ms. Peterson noticed that the Camaro was being driven erratically. It went onto the curb and swerved back over into the center lane. At approximately 6:30 p.m., Ms. Peterson called 911 to report the erratic driving.

Ms. Peterson followed the Camaro for several miles before they turned in opposite directions. At the urging of her boyfriend, Ms. Peterson turned around to see where the Camaro was going. When she saw it again, it was in a ditch off the side of the road, facing in the wrong direction opposite that of the lane of travel. Ms.

Peterson called 911 again to report the accident. She testified at trial that she saw Defendant walking around the car, trying to get it out of the ditch.

Ms. Peterson parked and, shortly thereafter, another call pulled up next to the Camaro. A female was driving with a male in the passenger seat. The man tried to help Defendant get the Camaro out of the ditch.

At approximately 6:40 p.m., Gaston County Police Officer Michael Pease ("Officer Pease") responded to Ms. Peterson's 911 calls. At that time, the Camaro was still off the road in a ditch, and Defendant and another man were standing beside it. Officer Pease asked Defendant if he was okay, and he responded that he was not injured. Defendant told Officer Pease that his brother had been driving the car and ended up in the ditch after trying to make a U-turn.

After speaking with Ms. Peterson, Officer Pease asked Defendant to explain again what had happened. Eventually, after being asked several times, Defendant admitted to driving the car himself and said he had tried to make a U-turn but had gotten stuck trying to back out. Officer Pease observed that Defendant was having a hard time making complete sentences and staying focused on the conversation.

Officer Pease testified that Defendant had trouble standing and staying still and appeared to be in "slow motion." Officer Pease noticed an opened 22-ounce Budweiser can in Defendant's car. Defendant admitted that he had consumed one and a half 22-ounce cans of beer that day. Officer Pease asked Defendant whether

he had taken any medication; Defendant responded that he had taken Xanax as prescribed by his doctor.

Due to Defendant's unsteadiness, Officer Pease decided to not perform any field sobriety tests. However, Officer Pease testified that he had formed the opinion, based on Defendant's behavior, that he had "consumed a sufficient quantity or had taken a dosage significant enough to appreciably impair his mental and physical capabilities impacting his ability to safely operate a motor vehicle."

Officer Pease took Defendant to the Gaston County Jail to blow into an Intoximeter. At approximately 7:47 p.m., Officer Brian Nelson ("Officer Nelson"), a certified chemical analyst, read Defendant his rights concerning the breath test and Defendant signed a form indicating that he had been so advised. Defendant requested a witness view the testing. Defendant called his roommate, and Officer Nelson testified, over defense counsel's objection, that Defendant reportedly stated: "I am not blowing. I've been through this shit in court, if I don't they will take my blood and it will take over a year to get the blood back, they are seizing my car too, I will have to buy another car and drive illegally."

Defendant submitted to the breath test at 8:20 p.m. The test measured Defendant's blood alcohol content as .06. A few minutes later, Defendant took another test and registered .07. Officer Pease asked Defendant to consent to a blood test, which he did. Defendant signed a form indicating that he had been read his

rights and gave written consent to the blood draw. Defendant's blood was drawn at approximately 8:30 p.m. and sent to the North Carolina State Bureau of Investigation (the "SBI") to be tested for the presence of drugs and alcohol.

Frank Lewellan, a forensic toxicologist with the SBI, conducted the chemical analysis of the blood. He found Defendant's blood contained .07 grams of alcohol per 100 milliliters of whole blood and detected the presence of Alprazolam, also known as Xanax. He could not testify as to how much Xanax was in Defendant's system because that type of testing is not currently available at the SBI.

Paul Glover ("Mr. Glover") testified as an expert for the State in blood and alcohol physiology, pharmacology, and related subjects. Mr. Glover opined that, based on Defendant's blood test results and the average rate of elimination, Defendant's blood alcohol level would have been .09 at the time of the accident. Mr. Glover also testified about the effects of mixing Xanax and alcohol. He explained that Xanax increases the level of impairment when mixed with alcohol and that studies indicate that drivers who mix the two have a tendency to weave in their lane and double their risk of crashing. According to Mr. Glover, Defendant acted consistently with a person who was impaired by alcohol and an additional substance.

At the close of the State's evidence, Defendant stipulated to three prior driving while impaired offenses for purposes of the habitual impaired driving charge that occurred on 20 May 2004, 26 August 2005, and 25 October 2012. The trial court

explained to Defendant that if the jury found him guilty of driving while impaired ("DWI"), he would be guilty of habitual driving while impaired and sentenced as a Class F felon for a minimum sentence of 12 months. Defense counsel moved to dismiss all the charges based on insufficiency of the evidence. The trial court denied Defendant's motion. The State dismissed the charges of unsafe movement and possessing an open container of alcohol.

At the beginning of Defendant's trial, defense counsel made a motion to redact Defendant's driving record, arguing that the failure to redact Defendant's prior convictions on it would result in the improper admission of prior convictions and would prejudice Defendant. The State countered that Defendant's prior convictions for DWLR should be admitted to show that he had knowledge that his license was revoked at the time of the offense.

The trial court allowed Defendant's driving record to be published to the jury but ordered that it should be redacted to show only Defendant's prior convictions for DWLR and his license suspensions. The redacted record showed various suspensions, including an indefinite suspension, three convictions for DWLR, and two accidents. All other convictions were redacted. The trial court also allowed into evidence an official notice from the Division of Motor Vehicles ("DMV") mailed to Defendant informing him that his license had been suspended from 25 October 2012 to 25 October 2014. Relatedly, the trial court admitted into evidence a certification by an

employee of the DMV stating that the official notice had been mailed to Defendant on 29 October 2012. At the time of publication, the trial court instructed the jury that:

> Members of the jury, when you see Exhibit 7A regarding defendant's driving record it would show -- or it tends to show that his license was revoked and it states for what reason. This evidence was received solely for the purpose of showing, in addition to his license was revoked, that the defendant had the knowledge -- well, let me just back up.
>
> Evidence is being received tending to show the defendant's license was revoked for a prior offense of driving while license revoked. This evidence [sic] received solely for the purpose of showing that the defendant had the knowledge, which is a necessary element of the crime charged in this case. If you believe this evidence you may consider it but only for the limited purpose of showing knowledge. You may not consider it for any other purpose.

During jury instructions, with regard to Defendant's driving record and the suspension letter, the trial court instructed the jury that

> Evidence has been received through a driving record tending to show that the defendant had a prior conviction for driving while his license was revoked. This evidence was received solely for the purpose of showing that the defendant had the knowledge, which is a necessary element of the crime charged in this case. If you believe this evidence you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

On 15 January 2014, the jury found Defendant guilty of DWI and DWLR. The trial court arrested judgment on Defendant's DWI conviction but entered judgment on habitual impaired driving based on Defendant's stipulations. Defendant was

sentenced to 120 days imprisonment on his DWLR conviction and a minimum term of 19 months to a maximum term of 32 months imprisonment for habitual impaired driving.

Defendant timely appeals.

Analysis

Defendant first argues that the trial court committed reversible error when it admitted, over defense counsel's objection, Defendant's driving record showing his prior convictions for DWLR. Defendant contends that his driving record showing these convictions was not admissible under Rule 404(b) or Rule 609 and that the improper admission "likely impacted" the jury's verdicts of DWLR and DWI[1]. We disagree.

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[1] Although not addressed by either party, initially we must determine whether this Court has the authority to review Defendant's challenge to the DWI verdict since the trial court arrested judgment on that conviction. As explained by this Court in *State v. Pendergraft*, __ N.C. App. __, __, 767 S.E.2d 674, 683 (2014), a trial court's decision to arrest judgment occurs in two instances: (1) where there is a "fatal flaw which appears on the face of the record, such as a substantive error on the indictment, with the effect of a decision to arrest judgment in this instance being to vacate the defendant's conviction and preclude the entry of a final judgment" pending review on appeal; and (2) "for the purpose of addressing double jeopardy or other concerns, such as a situation in which the defendant has been convicted of committing a predicate felony in a case in which he or she has also been convicted of first degree murder on the basis of the felony murder rule." This Court only has authority to review the arrested judgments entered in the second instance since the underlying guilty verdict "remains intact" and can be entered if the conviction for the offense upon which the predicate offense is based is overturned. *Id*.

Here, the trial court's decision to arrest judgment on Defendant's DWI charge was done to address double jeopardy since he was convicted and sentenced for habitual impaired driving which requires at least four instances of DWI, the current offense of DWI—in Defendant's case, the current offense that resulted from the 31 March 2013 incident— and three other prior convictions for DWI. *See State v. Hyden*, 175 N.C. App. 576, 579, 625 S.E.2d 125, 127 (2006). This would have implicated double jeopardy. Thus, for purposes of our review, the DWI judgment, which was arrested, is fully reviewable on appeal.

We review a trial court's decision to admit evidence under Rule 404(b) *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158–59 (2012). However, in order be entitled to a new trial, a defendant must show prejudice from the erroneously admitted Rule 404(b) evidence. *State v. Scott*, 167 N.C. App. 783, 786, 607 S.E.2d 10, 12-3 (2005). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]" N.C. Gen. Stat. § 15A-1443(a) (2013).

Even if we were to assume, without deciding, that the trial court erred in admitting Defendant's driving record showing his past convictions for DWLR and multiple suspensions, Defendant is unable to show that he was prejudiced given the overwhelming evidence of his guilt. In order to convict a defendant of DWLR, the State must prove beyond a reasonable doubt that: "(1) the defendant's operation of a motor vehicle (2) on a public highway (3) while his operator's license is revoked." *State v. Cruz*, 173 N.C. App. 689, 697, 620 S.E.2d 251, 256 (2005). The State must also prove that a defendant had actual or constructive knowledge of the revocation. *Id*.

> This Court has previously held that [t]he State satisfies its burden of proof of a G.S. 20–28 violation when, nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20–48 because of the presumption that he received notice and had such knowledge. . . . [I]f notice of a revocation is sent via the

> mail, . . . there is a rebuttable presumption that defendant has received knowledge of the revocation four days after a certificate or affidavit states that a copy of an official notice has been mailed to defendant's address. When mailing notice, evidence of compliance with the statute requires the State to show an official notice explaining the date revocation will begin and a certificate or affidavit of a person stating the time, place, and manner of the giving thereof.

Id. at 697-98, 620 S.E.2d at 256-57.

At trial, the State introduced an official notice addressed to Defendant stating that his driving privileges had been suspended from 25 October 2012 to 25 October 2014. It also introduced a certification from an employee of the DMV stating that the official notice had been mailed to Defendant on the mail date of the notice, 29 October 2012. Defendant offered no evidence to rebut the presumption that he had received notice of the revocation at the time he committed the current DWLR offense, 31 March 2013. Accordingly, given the evidence establishing knowledge, Defendant is unable to show that there is a reasonable probability that a different result would have been reached had the driving record not been introduced at trial.

With regard to Defendant's conviction for DWI, there was overwhelming evidence of his impairment. Officer Pease testified that Defendant was extremely unsteady and had a hard time completing sentences and staying focused on the conversation. Officer Pease observed an open container of alcohol in Defendant's car, and Defendant admitted to drinking alcohol that day and taking Xanax prescribed by

his doctor. Officer Pease testified that, in his opinion, Defendant had consumed a sufficient quantity of drugs and alcohol to be "appreciably impaired." Moreover, Mr. Glover testified as an expert that Defendant's blood alcohol level results indicated that he would have had a blood alcohol concentration of .09 at the time of the accident and that the combination of alcohol and Xanax would have an impairing effect on Defendant. Given the strength of this evidence, Defendant is unable to show that had the driving record not been admitted into evidence, which noted Defendant's past convictions for DWLR, there is a reasonable probability that the jury would not have found him guilty of DWI.

Next, Defendant argues that the trial court committed prejudicial error by instructing the jury when admitting evidence of Defendant's driving record that "[Defendant's] license was revoked for a prior offense of driving while license revoked" because the instruction informed the jury of the underlying reason for Defendant's suspension, a fact that was redacted from Defendant's driving record and inadmissible. We disagree.

Even if we were to assume, without deciding, that the trial court erred by improperly instructing the jury that Defendant's license was revoked due to a prior DWLR offense, Defendant is unable to show the prejudice necessary to entitle him to appellate relief. As discussed, the State's evidence of the official notice and corresponding certification of service create a presumption that Defendant knew his

license was revoked at the time he committed the current offense, a presumption which he failed to rebut. Thus, Defendant has failed to show that absent this jury instruction concerning Defendant's past conviction for DWLR, there is a possibility, much less a reasonable possibility, that the jury would have reached a different result.

Conclusion

Based on the foregoing reasons, we conclude that Defendant received a trial free from prejudicial error.

NO ERROR.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).